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1356

IN THE

United States

1356

Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVES-
TER KINNEY, CARL H. SORENSON, and ED
WARD,

Plaintiffs in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

*Upon Writ of Error from the United States District Court
for the District of Idaho, Southern Division.*

HAWLEY & HAWLEY,
J. R. SMEAD,

Attorneys for Plaintiffs in Error.

CLAUDE W. GIBSON,
WILLIAM HEALY,

Of Counsel for Plaintiffs in Error.

Filed....., 1923

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F. H. BROWN

....., Clerk

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STATEMENT OF THE CASE

Plaintiffs in error, together with five others, were indicted in the District Court of the United States for the District of Idaho upon an indictment containing six counts, to-wit:

1. The first count charged a conspiracy to possess for sale certain intoxicating liquors.

2. The second count charged a conspiracy to engage in the business of selling intoxicating liquors at retail and wholesale.

3. The third count charged a conspiracy to manufacture intoxicating liquor.

In each of the first three counts the indictment set out seven overt acts alleged to have been committed in furtherance of the respective conspiracies, as follows:

That Plaintiff in Error Sorenson and his wife, Edith Sorenson, on January 10, 1923, obtained and had in their possession certain intoxicating liquors at the Vernon Hotel in Boise, Idaho; that Edith Sorenson, originally one of the defendants, having been arrested, Plaintiffs in Error Goodfriend and Kinney supplied \$500.00 as her bond for appearance; that one Ed Kemp a defendant, on or about the 15th day of January, 1923, had in his possession five gallons of intoxicating liquor on the ranch of J. H. Evans, another defendant; that said Ed Kemp, on the 15th day of January, 1923, also had in his possession on the Evans ranch about 45 gallons of intoxicating liquor; that the said Ed Kemp, on the same date and at the same place, had in his possession certain distilling apparatus; that the said Ed Kemp having been arrested on the 15th day of January, 1923, for violation of the national prohibition act, Plaintiff in Error Goodfriend furnished a cash bond for him in the sum of \$1,000.00, and finally, that Defendant Carl Sorenson having been arrested on January 26, 1923, Plaintiff in Error Goodfriend became one of his bondsmen in the penal sum of \$1,000.00.

The last three counts of the indictment were as follow:

4. That the plaintiffs in error, together with other defendants referred to, had in their possession and

under their control, certain distilling apparatus set up for operation without first having registered the same with the Collector of Internal Revenue for the District of Idaho.

5. Plaintiffs in error and said other defendants did carry on the business of a distiller without having given a bond as required by law, and engaged in said business with intent to defraud the United States of the tax on the spirits distilled by them.

6. That plaintiffs in error and said other defendants did make and ferment in a building and on premises other than a distillery duly authorized, according to law, a quantity of mash, wort and wash fit for and designed for distillation.

The three conspiracies charged against the parties were each alleged to be entered into on or about the first day of December, 1922; the three charges in the last three counts of the indictment were each dated January 15, 1923.

The defendants all entered pleas of not guilty except the defendant, J. H. Evans, who was never arraigned or prosecuted, and who was called as a witness for the Government on the trial of the case.

The case was tried at the February, 1923, term of said Court; Defendant Edith Sorenson became ill during the trial and was unable to be present after the first day or two, and as to her a mistrial resulted; the case was dismissed as to the defendant Ed Hill on motion of the District Attorney at the close of the evidence, Defendant Henry Griffith was found not guilty, Defendant J. H. Evans has never been tried,

and plaintiffs in error on this appeal were each found guilty on each of the six counts of the indictment.

At the opening of the trial a motion was made that the Government be required to elect between the three conspiracy counts and the three last counts of the indictment, on the ground that the two sets of offenses were not of the same character or class, and therefore improperly joined. This motion was denied. Leave was then asked to withdraw temporarily the pleas of not guilty in order that defendants might move to quash the indictment. Leave was denied, and exceptions were taken to both rulings. (Transcript pp. 52-54.)

Defendant Griffith was Chief of Police of Boise City. Defendant Hill was Captain of Detectives on the police force under Griffith; Defendant Agnew was the Sheriff of Ada County, Idaho, in which Boise is located. Defendant Kinney was his office deputy; Defendant Goodfriend is a local physician in Boise; Defendants Sorenson and wife were the proprietors of the Vernon Hotel in Boise; Defendant Ed Kemp is a tradesman of Boise, and Defendant Ed Ward is a laborer and former liveryman of that place. Defendant Evans was a resident of Gooding, Idaho, a considerable distance from Boise, and also the owner of a small piece of property lying about two miles from Boise and adjoining a similar tract which was the residence of Dr. Goodfriend.

It developed at the trial that Defendant Goodfriend had rented the Evans place on two or three occasions to different parties, acting for Mr. Evans, and about the first of December, 1922, rented it to Defendant

Ed Kemp after calling Mr. Evans on the telephone concerning the proposed transaction. For a long time prior to that date the two Sorensens had been patients of Dr. Goodfriend, as had been the wife of Defendant Kemp. Goodfriend had also been somewhat active in local politics and during the preceding summer had been actively opposed to the candidacy of Sheriff Agnew for renomination at the primaries. Agnew was renominated, however, and through a change of deputies in his office he and Goodfriend became reconciled and Goodfriend later supported him for election. Mr. Agnew was elected and Kinney was retained as his office deputy. Growing out of the support of Agnew by Goodfriend during the campaign of 1922, Agnew visited Goodfriend's office at times before and after the election, as also did Kinney. The Sorensens were frequent callers for professional reasons at Dr. Goodfriend's office, and Defendant Ed Ward called there for similar reasons a few times. Chief Griffiths called at Dr. Goodfriend's office on one or two occasions about the first of the year 1923, and it was both affirmed and denied that Defendant Hill had been there on a few occasions.

The theory of the Government's case was that somewhere around the first of December, Goodfriend, the Sheriff, his Deputy, the Chief of Police and Captain of Detectives entered into a conspiracy to violate the National Prohibition Act and to this end they obtained Defendant Kemp and assisted him financially and otherwise to equip a distilling plant on the tract of land owned by Defendant Evans next to the Good-

friend residence tract, Goodfriend making the arrangements to rent the tract for Evans to Kemp and he and Sheriff Agnew actively participating in providing the distilling apparatus and supplies for the enterprise. The Government further contended that Defendants Sorenson, through their hotel, were to furnish a place to dispose of the product of the still, and that Defendant Ed Ward was likewise to act as salesman for the liquor. Evans was apparently indicted on the theory that he was one of the conspirators and knowingly let his property to be used for the purpose of setting up and maintaining a distillery.

The Government's entire case hinged upon the testimony of a woman, one Marie Curtis, who occupied two rooms in the Empire Building in Boise, one of which adjoined the private office of Dr. Goodfriend. This woman professed to have voluntarily undertaken a course of espionage upon Goodfriend's office, his callers and his activities, and professed to have overheard many conversations carried on between the doctor and others of the defendants, as well as a number of persons who were not complained of in any way; and it was upon her testimony that the Government based its case very largely. She professed to have heard and remembered several conversations in December, 1922, and that during the closing days of December and through January and February, 1923, she listened to other conversations and thereafter wrote them out in a series of notebooks which she kept for that purpose. Certain Prohibition Agents were sent to her office or room at a time after she claimed to

have commenced her operations and they also testified to having heard certain conversations which they afterwards wrote out at some length in the form of narratives. Only one of these, however, testified to anything of any particular importance as disclosed by the transcript of the evidence herein. This was one Oscar Kuchenbacher. One of the points presented by the plaintiffs in error deals at some length with the use of the alleged notes of these witnesses, and it is contended on this hearing that the testimony so adduced was not testimony of any recollection of the witnesses, but amounted merely to their reading of narratives composed by themselves at a time subsequent to the conversations and without any actual recollection on their part of the conversations and the other details about which they assumed to testify. The memoranda were not offered in evidence. (Pp. 128-315, Transcript.)

The Government also offered in evidence certain property, including a small quantity of intoxicating liquor, which had been seized at the Vernon Hotel on January 10, 1922, prior to the trial, during a search conducted there, ostensibly pursuant to a search warrant in their possession. It is likewise contended that the search was unwarranted and unlawful, and that the affidavit upon which the search warrant was issued was insufficient and the warrant itself insufficient to justify any search and that in fact the only search conducted and the only property seized was in a suite of rooms occupied in the hotel solely and exclusively as the private family residence of the defendants Sor-

enson and their son. No showing having been made sufficient to justify the search of such a dwelling, the Sorensons petitioned for the return of the property and that the search be declared illegal. These proceedings were originally had in a case at that time commenced against the two Sorensons for the maintenance of a nuisance and possession of intoxicating liquor. The petition was denied, and it was stipulated after the indictment in the case at bar was returned that the record of proceedings commenced by said petition should be made a part of the record in this case. (Transcript, pp. 27-49, 71-87.)

The Government also offered in evidence a large amount of property, including a considerable amount of intoxicating liquor which was seized on the Evans ranch on January 15, 1923, pursuant to a search warrant directed against that place, at which time Kemp was arrested and charged with possession of liquor and distilling apparatus. (Transcript, pp. 93-101.)

In an effort to connect the Plaintiff in Error Ed Ward with the case, the Government went at considerable length into a transaction alleged to have occurred at a place known as the Union Rooming House in Boise, which evidence dealt with the alleged sale by one Mrs. Goldsbury of a bottle of intoxicating liquor in December, 1922. The evidence produced by the Government showed that Defendant Ward had nothing to do with the Union Rooms except that he had a room there. One of the witnesses for the Government stated that Ward was present at the time the liquor was bought, but that he thought no one saw

the transaction but the witness himself and Mrs. Goldsbury. This procedure is also assigned as error on this appeal as a matter entirely disconnected and prejudicial to the rights of defendants. (Transcript, 59-71.)

In the course of the evidence, a number of conversations were attributed to Dr. Goodfriend as having been had with persons unknown to the witnesses. These are made the subject of certain assignments of error treated in this brief. It is contended by plaintiffs in error that such matters were not properly admitted because they were not shown to have any connection with the charge or to be in any way related to the alleged dealings between the defendants.

At one point in the testimony the Government brought before the jury an alleged detectaphone apparatus and over the objection of the defendants inquired at some length as to the operation of it, the quality of results obtained through it, and as to its having been placed in the Curtis rooms and the transmitter placed in Dr. Goodfriend's private office underneath his desk and attached by appropriate wires to the receiving apparatus in the Curtis rooms. After all of this matter had been gone into rather fully, and the fact had been brought out that certain parties undertook to listen to what was being said in Goodfriend's office, using this apparatus for this purpose, an objection was made to the whole matter on the grounds that it violated Goodfriend's constitutional rights, which was temporarily sustained by the Court for the purpose of looking further into the authorities. Shortly thereafter, the Government, having explained the instru-

ment to the jury and having established that it was set up in the Curtis rooms for the purpose of listening to what went on in Goodfriend's office, withdrew the offer of the apparatus. It is contended that it was error to permit the demonstration of this apparatus before the jury and to permit any testimony concerning it and its installation in the Curtis and Goodfriend offices, since it could not but leave in the jury's mind an inference that had the Government undertaken it could have produced a great deal more evidence that was obtained over the detectaphone. (Transcript, pp. 115-128, 141-150, 182.)

In the course of the examination of Marie Curtis at various times the defendants attempted by different questions to inquire into the relations of Marie Curtis with the organization known as the Ku Klux Klan and as to her activities on behalf of that organization, but on each occasion were denied the right to do so. Exceptions were taken to such rulings and those matters are also made the subject of assignments of error herein.

Repeatedly the Government brought up matters pertaining to the possible gambling at cards by Dr. Goodfriend, and was finally allowed to go into the question of his reputation for so doing over his objection. This is assigned as prejudicial error.

Repeatedly the defendants attempted to inquire whether or not the searches of the Vernon Hotel and of the Evans ranch were brought about through information acquired prior to those times through the espionage conducted at Dr. Goodfriend's office. The

Government's objections were sustained and defendants were also denied the privilege of introducing the affidavit and warrant pursuant to which the Evans ranch was searched for the purpose of showing by the documents themselves that the search was not brought about by anything heard or seen at Dr. Goodfriend's office. These matters are also assigned as error.

Error is also assigned on account of certain instructions given the jury by the Court, to the effect that they might find the defendants guilty under Counts 4, 5 and 6, respectively, of the indictment. These instructions were duly excepted to. (Transcript, pp. 447-450.) There was no evidence whatever touching the gist of the offenses in each of these counts, each being framed under one of the re-enacted revenue laws, to-wit: failure to register a still, failure to provide a distiller's bond, and the making of mash in a place other than a distillery. There having been no evidence that the still in question was not registered, that a distiller's bond was not furnished, or that the building in question was not a distillery established according to law, it is contended that the Court should either have ordered a dismissal of those charges or instructed to find the defendants not guilty on each.

At the beginning of the proceedings in this cause an application was made for an order requiring the Government to furnish a bill of particulars. This application was supported by the affidavit of the various defendants as required by law; the order for the bill of particulars was denied and defendants' exception pre-

served. (Transcript, pp. 451-467.) The denial of the bill of particulars in toto is assigned as error, it being contended herein that the Court abused his discretion in denying some, at least, of the requests for a more particular statement of the charge against the defendants.

The judgment pronounced against the defendants (p. 51) is of a general nature and does not specify on what count or counts the judgment is pronounced nor does it in any way refer to the specific findings of guilty on the different counts as contained in the verdict. (p. 49).

Exception was also taken to the verdict and error is assigned by defendants on the ground that the verdict was not supported by the evidence and is contrary to law. This is on the ground that three several and distinct conspiracies were found to exist, whereas such a finding was not justified by the evidence; and that the verdict combined a finding on three conspiracy counts depending on the National Prohibition Act and the general conspiracy statute and three other counts depending upon the Internal Revenue Laws; the National Prohibition Act making it unlawful to make, sell, dispose of or possess intoxicating liquor, and the Internal Revenue Laws referred to making the business of setting up a still, distilling and establishing a distillery lawful and requiring only that certain matters pertaining to registration, bond, etc., be complied with; it is contended that such a verdict as here rendered is contrary to law and also that it is unsupported by the evidence. This assignment of

SPECIFICATIONS OF ERROR

1. The Court erred in denying the motion for a bill of particulars prior to the trial. (Transcript, pp. 451-467.)

2. The Court erred in failing to require an election between the conspiracy charges and the charges under certain of the Internal Revenue Laws, as contained in the indictment. The motion was made at the beginning of the trial and renewed at the close, and on each occasion denied and exceptions taken. (Transcript, pp. 7-25, 53 and 446.)

3. The Court erred in refusing the defendants leave to make a motion to quash the indictment at the beginning of the trial. (Transcript, p. 55.)

5. The Court erred in permitting the witness, Goodenough, to testify concerning the purchase of intoxicating liquor from Mrs. Goldsbury in December, 1922, inasmuch as she was not a defendant and no connection appeared between the transaction and the issues of the case. (Transcript, pp. 59-65.)

6. The Court erred in permitting the witness Goodenough to testify to his conversation with the Prosecuting Attorney and the Deputy Sheriff about his alleged purchase of liquor from Mrs. Goldsbury, such conversations occurring without the presence of any of the defendants. (Transcript, pp. 62-62.)

7. The Court erred in permitting the witness Graven to testify to the same matters testified to by the witness Goodenough, above referred to. (Transcript, pp. 65-68.)

8. The Court erred in sustaining the Government's objection to the following question asked the witness Graven in connection with his other testimony:

Q. "And you didn't tell them at that time that you had gotten whiskey the day before at a time much earlier than you claimed to have gone to the Union Rooming House, did you?" (Transcript, pp. 66-67.)

9. The Court erred in permitting the Prosecuting Attorney for Ada County to testify concerning his conversation with Witnesses Graven and Goodenough concerning their alleged purchase of liquor from Mrs. Goldsbury, such conversation being outside the presence of any of the defendants and being hearsay. (Transcript, pp. 68-71.)

10. The Court erred in permitting evidence to be offered concerning what was seen and heard by Officers Steunenberg, Waggoner, Reynolds and Nickerson in the course of a search of the home of Plaintiff in Error Sorenson, January 10, 1923, at the Vernon Hotel, Boise, Idaho, because the evidence showed that such search was illegal and because the record theretofore made in this cause showed that the Court had erroneously denied said Sorenson's petition for the return of property seized in the course of said search and to have said search declared illegal. (Evidence of officers, Transcript, pp. 71-87; record of petition, hearing thereon and ruling, Transcript, pp. 28-49.) And further erred in the same connection in permitting the Government to put in evidence the property seized in the course of said illegal search in connection with testimony of the

officers above referred to, for the reasons already assigned.

11. The Court erred in denying the motion to strike out the testimony of the witness Steunenberg concerning the matters set forth in Assignment No. 10 listed above. (Transcript, p. 80.)

12. The Court erred in overruling the objection to the testimony of Officer Nickerson, above referred to, concerning the same matters set out in Assignment No. 10. (Transcript, pp. 80-84.)

13. The Court erred in overruling the objection to the testimony of Officer Reynolds concerning the same matters set out in Assignment No. 10. (Transcript, pp. 84-86.)

14. The Court erred in denying the defendant's objection to the testimony of Officer Waggoner concerning the matters set out in Assignment No. 10. (Transcript, pp. 86-87.)

15. The Court erred in refusing and denying the petition of Plaintiff in Error Sorenson to have the search of the Vernon Hotel declared illegal and to obtain return of the property seized in the course of said search. (Transcript, pp. 28-49.)

16. The Court erred in permitting the witness McCutcheon to testify concerning the commencement of an abatement action against the Vernon Hotel, and against Plaintiff in Error Sorenson and his wife, no connection being shown with the issues of this cause, and the effect of the testimony being prejudicial. (Transcript, p. 92.)

17. The Court erred in admitting in evidence two copies of printed periodicals under dates of March 16 and March 23, 1922, bearing the name and address of Plaintiff in Error Goodfriend and alleged to have been found in the house on the Evans ranch where certain distilling apparatus was seized and was later contended to be connected with this cause. Error is assigned because of the remoteness of the dates of the periodicals and because they are not shown to have ever been in Defendant Goodfriend's possession, nor was any connection established between them and the issues of this cause. (Transcript, pp. 95-98.)

18. The Court erred in refusing to permit Plaintiffs in Error to question Officer Reynolds as to whether the copy of the search warrant served on Defendant Ed Kemp at the time of a search of premises occupied by him, where distilling apparatus was seized, and later was contended to have been connected with Plaintiffs in Error, correctly stated the reasons for the search, and also as to whether the affidavits made by the witness correctly stated such reasons. (Transcript pp. 95-100.)

19. The Court erred in refusing the offer of the original affidavit for the search warrant used in searching the Evans place, where Defendant Ed Kemp was arrested and certain distilling apparatus seized, which affidavit showed what information and reasons led to such search. This was the same affidavit referred to in Assignment 18 just preceding. (Transcript, pp. 396-401.)

21. The Court erred in permitting the witness Robin Reynolds to explain and demonstrate before the jury a certain alleged detectograph apparatus and its operation and use. (Transcript, pp. 115-128, 182.) This is alleged as prejudicial in view of the references of other witnesses to the apparatus and the subsequent withdrawal of it by the prosecution.

22. The Court erred in refusing to permit the Plaintiffs in Error to obtain an answer from the witness Robin Reynolds in connection with the detectograph apparatus above referred to, to this question:

Q. "Haven't you heretofore stated about this particular instrument that if you had occasion to use it again you would want to send away and get a different form of transmitter?" (Transcript, p. 123.)

23. The Court erred in permitting the witness Robin Reynolds to set up and demonstrate the detectograph apparatus in response to the direction of the United States Attorney to set the same up as it was in the rooms adjoining Dr. Goodfriend's office. This assignment is in connection with Assignment 21 above and rests on the same grounds.

24. The Court erred in permitting the witness Marie Curtis to testify about the alleged conversation between Plaintiff in Error Goodfriend and Defendant Griffith concerning a place referred to as "Jap's place", which place was never otherwise connected with the issues of this cause, and erred in denying the motion to strike out her testimony concerning such conversation because the same was prejudicial and dealt with

matters not included in the issues of this cause. (Transcript, pp. 138-141.)

25. The Court erred in permitting the witness Marie Curtis to testify from her notes, in view of her statement that she had no independent recollection of the matters testified to, that she could answer no questions except by referring to her notes, that she selected from the conversations she claimed to have heard only what she concluded had a bearing on this case, that she could not, after consulting her notes to refresh her memory, tell as to what she claimed to have heard; that she did not attempt to make a complete record of the conversations as she heard them at the time when her record was written; and in permitting the witness to read from her notes to the jury and permitting her at times to state to the jury in other words what she considered her notes to mean. The notes were never offered in evidence, and there was no opportunity to object to the notes themselves. (Transcript, pp. 128-238.)

26. The Court erred in permitting the witness Marie Curtis to testify to a conversation between the Defendant Goodfriend and a man unknown to the witness concerning the defendant's telephone line about February 8, 1923. (Transcript, p. 193.)

27. The Court erred in refusing to permit the witness Marie Curtis to be cross-examined concerning the connection of herself and her husband with the Ku Klux Klan, her activities and interest in the political campaign in which the Defendant Agnew had been

renominated for sheriff and in which his opponent had been indorsed by the said Ku Klux Klan, and as to her having had a quarrel with Defendant Goodfriend in December, 1922, on the subject of the Ku Klux Klan. (Transcript, pp. 198, 199, 237, 202-203, 206, 231.) A part of the same matter had been gone into by the Government with another witness. (Transcript, pp. 54-59.)

28. The Court erred in denying a motion to strike out the testimony of Marie Curtis regarding alleged conversations between certain of the defendants prior to December 29, based on the grounds that her testimony showed that she was stating recollections of notes which she made some weeks after the conversations were claimed to have occurred, and not a present recollection of the conversations themselves. (Transcript, pp. 211-212.)

29. The Court erred in refusing to permit Marie Curtis to answer whether she had an independent recollection as to how long after the conversations testified to by her from her notes, she had prepared such notes. (Transcript, p. 216.)

30. The Court erred in permitting the witness Kuchenbacher to use and testify from his notes of conversations and happenings alleged to have occurred in Defendant Goodfriend's office, because of the witness' own statement that he could remember no conversations and could not testify except by reading his notes; that his original notes had been destroyed and that the ones used on the witness stand by him were written

up later than the original notes and enlarged upon when written; the notes so used never being offered in evidence by the Government. (Transcript, pp. 239-245, 252, 266.)

31. The Court erred in permitting the witnesses Curtis and Kuchenbacher to read from their notes as part of their testimony while on the witness stand. This assignment is based on those parts of the transcript already cited in connection with these two witnesses, Assignments 25, 28, 29, 30.

32. The Court erred in permitting the witness Kuchenbacher to testify to an alleged conversation between the defendants Goodfriend and Griffith concerning Defendant Hill and in connection with a place referred to as "Jap's place", and to further testify in regard to a certain policeman by the name of Briggs then on the police force, and to further testify concerning conversations relating to "stool pigeons", and to further testify to a conversation concerning Defendant Agnew being after a place known as the White House, all of which matters and things were not shown to have any material relation to the charge herein, and were prejudicial to the Plaintiff in Error Goodfriend. (Transcript, pp. 243-246.)

33. The Court erred in permitting the witness Kuchenbacher to testify about an alleged conversation between Defendant Goodfriend and a man unknown to the witness concerning Goodfriend's making some money and going to some world's fair, and concerning parties called Gill and George, and to where Defendant

Goodfriend thought Gill's "cache" was, and that Goodfriend could furnish protection to the White House in the matter of card playing, all of which matters are unrelated and immaterial and prejudicial to Plaintiff in Error Goodfriend. (Transcript, pp. 246-248.)

34. The Court erred in permitting the witness Kuchtenbacher to testify concerning deposits claimed to have been sent to a certain bank by Defendant Goodfriend through some man unknown to the witness, which matter was never connected with the case or shown to have any material relation to it. (Transcript, pp. 262-263.)

36. The Court erred in permitting the witness Paul Reynolds to testify from his notes, in view of his statement that his original notes taken at the time of the alleged conversations about which he testified were twice rewritten and enlarged upon and his original notes, being notes of all he heard of the conversations, having been destroyed, and he having made no claim that he had no present recollection of the matter, and having shown no necessity for referring to his notes while on the witness stand. (Transcript, pp. 283, 278-284.)

37. The Court erred in permitting the witness Paul Reynolds to read his notes from the witness stand. (Transcript, p. 286.)

38. The Court erred in sustaining an objection to the following question put to the witness Paul Reynolds:

Q. "And now, Mr. Reynolds, had you anything that you took to be information concerning any whisky at the

Vernon Hotel prior to hearing that conversation you have told about?" (Transcript, p. 288.)

The said question related to the witness' testimony concerning the conversation he claimed to have heard in Defendant Goodfriend's office between Goodfriend and another, and related to the matter already testified to by the same witness, concerning a search of the Vernon Hotel made pursuant to a search warrant. (Transcript, pp. 84-85, 285.)

39. The Court erred in refusing to permit the defense to inquire of the witness Paul Reynolds whether the search of the Vernon Hotel already testified to by him (see citations in Assignment 38) was brought about by the conversations he claimed to have overheard in Dr. Goodfriend's office. (Transcript, p. 288.)

40. The Court erred in refusing to permit the defense to inquire of the witness Paul Reynolds as to whether he had any other information upon which he relied in obtaining a search warrant for the Vernon Hotel other than he claimed to have gotten through conversations alleged to have been heard in Dr. Goodfriend's office. (Transcript, p. 289.)

42. The Court erred in denying the defense's motion to strike out the testimony of the witness Harry Briggs, who had been discharged from the police force, in view of the fact that it was not shown why he was discharged or by whom, nor was his discharge shown to have any connection with the case on trial; the matter being prejudicial to Plaintiff in Error Goodfriend. (Transcript, pp. 338-339.)

43. The Court erred in permitting the prosecution to inquire of Defendant Griffith concerning the acts and reputation of the Defendant Goodfriend, Plaintiff in Error, concerning his gambling and playing cards. (Transcript, p. 92.)

44. The Court erred in refusing to permit Witness Ernest Stoops to testify as to what, if any, orders had been given by Defendant Griffith as Chief of Police concerning the enforcement of the prohibitory liquor laws in Boise, and erred in refusing defendants an opportunity to make an offer of proof as to the propriety and competency of such evidence. (Transcript, pp. 391-393.)

45. The Court erred in sustaining the Government's objection to the defendants' offer of the original affidavit filed before Commissioner Jackson to procure the search warrant for the J. H. Evans place, pursuant to which certain distilling apparatus was seized and later offered in evidence in this cause, and at which time Defendant Kemp was arrested, said affidavit being marked for identification Exhibit 34, and showing on its face that the claims of the prosecution that the illicit distilling on the Evans place was discovered through overhearing conversations in Defendant Goodfriend's office were unfounded; and also rebutting the inference shown by the prosecution that the search warrant was procured and the search made because of what was heard in Defendant Goodfriend's office. (Transcript, pp. 396-401.)

47. The Court erred in instructing the jury concerning counts four, five and six of the indictment as follows:

“I now come to an analysis of the indictment, and I will try to make that as brief as possible. You have been advised that the indictment contains six separate charges or counts. The first three counts are for conspiracy, that is, each one of the first three counts are for conspiracy, and each of the last three counts is for direct violation of what are commonly known as the revenue laws of the country, laws which have been upon the statute books a great many years, long before prohibition became even a state or a national policy. I will call your attention to those charges later on.

* * * * *

“Now, in the fourth count the defendants are charged with having wilfully and knowingly, etc., had in their possession and custody a still, set up and ready for operation, without having first registered the same. Now that is based upon a statute, gentlemen, of some length, and I am not going to try to read it to you. It would be confusing to do so. It is based upon a statute which, as I have already intimated to you, has been upon the statute books for a long time. It was in existence when the country was still wet, as we put it. It provided safeguards in the enforcement of the revenue measures. The Government collected revenues from the liquor business, various branches

and features of it, and in one of the provisions of the law it is declared that one shall not have possession of a still set up—you will understand by that, not a still for sale, as a merchant would have it, but a still set up, ready for use. He should not set up any still or have it set up until he had registered in the manner provided by the law, with the collector of the district, with the public officer called the collector. That is the substance of the first charge. Then there is another provision in the same general law which provides that no one shall go into the business or engage in the business of distilling or being a distiller until he had first put up a bond to the Government, provided the bond prescribed by law. And that is the gist of the fifth count.

“And in the sixth count it is charged that the defendants engaged in the making and fermentation of mash or wort fit for distilling purposes, for distillation, in a place other than a distillery, and that is made an offense by the same general laws. It was to require that all liquor, that is fermented liquor, should be made in a distillery, a place well known, where government agents could go and measure it up and find out what the facts were, for the purpose of collecting revenue. So you have those charges contained in the last three counts. Number four, having a still set up without first registering with the collector; number five, engaging in the business of distilling without

a bond; and number six, making and fermenting mash fit for distillation purposes in a place other than a distillery. I have to say to you in respect to those three charges that upon his own statement you would be warranted in finding the defendant Kemp guilty, if you believe his statement. As I say, I am not directing you to find him guilty. It is for you to say from all of the evidence, but if you believed his evidence, and there was nothing else, that would be sufficient upon which to base a verdict of guilty. It is for you to say what the truth is. Before you can find the other defendants guilty upon these three counts, or any one of them, you must find that they knowingly participated in such violations of the law. It isn't necessary that they be present or actually or directly with their own hands take part in setting up or operating the still if, with knowledge of Kemp's purpose, they knowingly aided or abetted him in the unlawful enterprise of having a still set up, if you find that he was engaged in that, even though they worked at a distance, that is, the other defendants, remotely, they, too, would be chargeable with responsibility, that is, under the general principle that one who aids or abets another in a commission of a crime is himself equally guilty with the principal and is punishable as such."

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To the foregoing instructions the following exception was taken and allowed:

"Come now the defendants severally, and each for himself excepts to the instructions of the Court given to the effect that the defendants or any of them might be convicted on either of the last three counts of the indictment herein, for the reason that said counts are based upon the internal revenue laws, exclusively, and no proof has been submitted that the still in question was unregistered, that the distiller's bond in question in Count five was not furnished, or that the building in question in count six was not a registered distillery." (Transcript, pp. 447-450.)

48. The verdict of the jury is specified as unlawful: First, there is no proof that the building mentioned in Count six of the indictment was not duly authorized as a distillery;

Second, there is no proof that the distiller's bond mentioned in Count five of the indictment was not furnished:

Third, there is no proof that the still mentioned in Count four of the indictment was not lawfully registered;

Fourth, the evidence does not warrant finding that three different conspiracies existed as charged in Count one, two and three of the indictment. (Transcript, pp. 7-25, 49-50.) As to the failure of proof concerning Counts four, five and six of the indictment, the record speaks for itself and, of course, no particular citation to the transcript is possible.

49. The verdict is contrary to law for the reasons set out in Assignment 48 last above. And the judgment is unlawful for the reason that it is based upon a verdict which is unlawful and unsupported by the evidence in the particulars set out in the two foregoing assignments.

* * * * *

In the argument, each subdivision refers to one or more of the foregoing Specifications of Error, each being referred to by the number given it in the foregoing Specifications.

error relates also to the assignment concerning the Court's instructions, and the assignment concerning the Court's refusal to require an election between the two classes of charges contained in the indictment.

The record herein is necessarily so lengthy and the matters heretofore referred to in this statement so scattered through it that we have endeavored up to this point to give transcript citations which will apprise the Court of the nature of the case, the character of the evidence, and in a somewhat specific way, the nature of and the reasons for the assignments of error upon which the plaintiffs in error depend.

In the brief proper, immediately following, we have analyzed the record very closely and in our citations to the transcript have endeavored to bring together such separated portions of it as in each instance have material bearing on the points and assignments of error under discussion.

ARGUMENT

We have grouped the assignments of error according to their natural relation to each other. Each group will be treated separately, and for that purpose we have subdivided this portion of the brief into a number of different sections.

I

Assignments 2 and 3 are directed to the Court's refusal to sustain a motion for an election between the conspiracy counts in the indictment and those based on the Internal Revenue Laws, and to the

Court's refusal to permit a motion to quash the indictment. (Transcript, pp. 52-54, 7-25.)

It is well established that charges of the same class can be combined in the same indictment.

Pointer vs. U. S., 151 U. S. 396, 38 L. Ed. 208.

But the converse is true, that offenses of different kinds should not be joined.

The indictment in question charges three conspiracies to violate the National Prohibition Act. It also contains three charges alleging violation of the Internal Revenue Laws. When Congress re-enacted the penalties prescribed by the revenue laws, some of which laws had been repealed by the terms of the Prohibition Act, the Supreme Court held that this amounted a re-enactment of the revenue laws themselves.

U. S. vs. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043.

U. S. vs. Stafoff, U. S., 67 L. Ed. 211.

The National Prohibition Act makes the manufacture and sale of liquor illegal. On the other hand, the revenue laws deal with the manufacture and sale as an incident, legal, and the gist of each offense under the revenue laws is the failure to perform a condition precedent.

Failure to register a still, failure to furnish a bond coupled with intent to defraud the government of the tax on distilled spirits, and failure to establish the legal status of a building used for distilling, are respectively the last three charges of this indictment.

It hardly seems possible that one trial based on a single indictment should suffice to determine issues in part arising out of a law making a thing illegal, and in part out of other laws making the same thing legal. An indictment should hardly be a Janus-faced affair, looking in opposite directions at the same time. In order to establish its case under such a group of charges, the Government would seem to be obliged to prove that acts of precisely the same character are at one and the same time both lawful and unlawful. The whole evidence herein shows that the same overt acts are relied on as establishing the Government's case in both groups and kinds of charges.

We do not attempt to offer specific authority for the points, but we think the thing itself speaks for itself. Further, if it was unlawful for parties to combine together to make, or to sell, or to possess intoxicating liquors, it would hardly seem possible that the self-same making could have been legalized by the mere registration of the apparatus and of the building, or by furnishing a distiller's bond. If it could have been so legalized, then conversely, it was not a crime for the parties to join together for the mere purpose of making, or selling, or possessing such liquor. Such a charge would not be complete. The first three charges are *not* of conspiracies to violate the Internal Revenue Laws by refraining from doing the things required by the Internal Revenue Laws. We are aware that a conspiracy count may be joined with a count charging the commission of the offense contemplated by the conspiracy; but such is not the case here.

In the first three counts the position is taken by the prosecution that making liquor is in itself a crime under whatever circumstances it may occur. In the last three counts the position is taken that the possession of a still, which possession is illegal if judged by the same law upon which the first three counts rest, is legal provided it is properly registered with the collector of internal revenue; and that making liquor is legal provided the distillery is properly established, a bond furnished and the tax on distilled spirits paid. An offense, if any, would not be the distilling, but the failure to register, give bond, etc. To sustain these conflicting positions, the Government offered evidence touching upon one, and only one, act of manufacture. We submit that it was error to refuse to require an election between these sets of charges.

II

Assignments 48 and 49. The verdict herein is unlawful, for the reasons last assigned. (Trans., pp. 49-51.) Upon the same evidence the jury has dealt with both classes of charges precisely as though the gist of each arose out of the provisions of the Volstead Act. The legality or illegality of the acts charged as conspiracy depended on the Prohibition Act. But one cannot be convicted under both the Prohibition Act and the Revenue Laws for the same act.

U. S. vs. Stafoff, *supra*.

Further, there is nowhere in the record any evidence of a failure to register a still by plaintiffs in error, or

a failure to furnish a bond, or of a failure properly to establish and register a distillery as required by the Internal Revenue Laws. For this reason, we think the verdict in Counts 4, 5 and 6 of the indictment is not supported by the evidence and is unlawful; and it will be noted that the judgment (Trans., p. 51) is general; no doubt the Court in pronouncing sentence was influenced at least to a point of greater severity by the fact of a verdict of guilty on the last three counts as well as on the first three. This is a fair assumption. It seems inescapable that a Court sentences with greater or less severity in accordance with the jury's verdict on a number of different offenses tried together. And in all events a defendant is entitled to know for what he is being sentenced and to insist that he should not be sentenced upon charges unsupported by the evidence. Neither was there evidence to support a finding of guilty of three different conspiracies. There was, if any, one and only one.

III

Assignment No. 47. In the instructions to the jury (Trans., pp. 447-450), the Court instructed the jury that they might find the defendants guilty on the counts based on the Internal Revenue Laws. Exception was taken on the grounds that there was no evidence to support these counts. For the reason last stated we submit that there was error. There was no evidence of the failure or omission which constituted the gist of the charges in Counts 4, 5 and 6 of the indictment. (Trans., pp. 23-25.) Error in such instructions is al-

ways prejudicial. The jury must have understood that they could find a verdict of guilty under either or both of the differing classes of statutes on which the indictment rested.

We think that the judgment should be reversed because of this error.

IV

At this point we group together Assignments Nos. 10, 11, 12, 13, 14 and 15. These assignments all relate to the matter of the search of the private dwelling of Plaintiff in Error Carl Sorenson, the same having been a suite of rooms in the Vernon Hotel. During said search certain property was taken from the apartment. Edith Sorenson, his wife, afterwards one of the defendants in this case, concerning whom a mistrial resulted because of her illness, was arrested. Later she and her husband were informed against jointly in the United States District Court. Finally petition for the return of the property and to have the search declared illegal was made. The petition was verified by the oath of each and in support thereof was filed the affidavit of Plaintiff in Error Sorenson, and the affidavits of four other persons acquainted with the Vernon Hotel and the use of the rooms in question by the Sorensens as their private dwelling. Order to show cause was issued and served on the Prohibition Director for Idaho. He appeared in answer to such order by filing a demurrer to the petition and to the showing in support thereof. The matter was heard and taken under advisement on such demurrer and

thereafter the demurrer was sustained. Thereafter, when the two Sorensens were indicted in this case, it was stipulated that the record concerning the petition and the proceedings had thereon should be part of the record in this cause, which stipulation was approved by the Trial Judge (Transcript, pp. 27-49). As noted above, the hearing was had on the demurrer. None of the facts as set forth by the petition nor by the affidavits in support thereof were controverted. It was contended that the affidavits should not be considered because they were made before a Notary Public and not before a Federal officer qualified to administer oaths. The Court evidently did not take that contention seriously, since his opinion above referred to makes no mention of it. However, we think it is of small import whether the affidavits were properly verified or not. The demurrer admits the facts set forth in the petition and it cannot be denied that the petition was filed on behalf of the defendants by their attorney qualified to appear for them; that it set forth the search warrant and the affidavit upon which the search warrant was issued, and that all of the facts set forth were admitted by the Government. It cannot be seriously contended that the Government rested upon anything other than a pure question of law. The Court held distinctly that the facts contained were not sufficient to warrant a return of the property or a holding that the search was illegal. If the petition stated facts sufficient to show that the search was illegal, or if the affidavit upon which the search warrant was issued was insufficient, or if the warrant itself

was insufficient because of uncertainty or indefiniteness or otherwise, the property should have been returned and the search warrant held to be illegal, and the Government should have been denied the right to offer any evidence concerning what was taken in the search or what was learned in the course of conducting the search.

The affidavit upon which the search warrant was issued is shown by the exhibits attached to the petition and was also offered in evidence at the trial as Government's Exhibit 13 (Transcript, p. 81). It is entirely devoid of any statement of fact. The most that can be said for it is that the affiant had some information from some undisclosed source which he believed to be authentic. However, that part relating to the presence of liquor in the Vernon Hotel is pure hearsay. The law, Act of June 15, 1917, Title XI, 40 Stat. 228, providing the procedure necessary for the lawful issuance of a search warrant (see Sec. 25, Title II, National Prohibition Act) is very definite on this point.

Section 3:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 5:

"The affidavits or depositions must set forth the facts tending to establish the grounds of application or probable cause for believing that they exist."

The term "probable cause" is well understood and plainly defined. It is of established meaning in the law, it occurs at other points in criminal procedure, and is too well understood to require much discussion. If a statement by the lone affiant who subscribed the affidavit in question here, that some unnamed person at some unspecified time told him so and so, is acceptable as evidence in a proceeding to procure a search warrant, the case forms an exception to all other situations and is in a class by itself. Certainly the only "fact" that such an affidavit shows is the fact of the telling; it does not place anybody's oath behind the details told. Considered as evidence acceptable in judicial proceedings, and particularly in one conducted in the light of fundamental, constitutional guaranties, it has no standing. If a residence may be searched in spite of the constitutional guaranty and the statutes governing the issuing of search warrants, upon the strength of an affidavit containing hearsay, then there is no good reason why a man may not be put on trial in a criminal proceeding and convicted upon like hearsay testimony. Either procedure would be distinctly a violation of the Constitutional provision. The Fifth Amendment to the Constitution provides against searches and seizures except "upon probable cause supported by oath or affirmation * * *". Probable cause has been held universally and for many years to be established when *facts*, as that word is used in the law of evidence, have been shown upon the oath of a witness or witnesses sufficient to give rise to a reasonable belief in the existence of the thing or

matter in question. If this can be done by hearsay in a search warrant proceeding, the case occupies a position of splendid isolation.

The danger of permitting such proceedings upon hearsay affidavits is well illustrated in this case. The affidavit states that affiant's informant saw some whiskey in Room 207 of the Vernon Hotel. It appears beyond question that there never was any such room in that hotel. Nobody contended at the hearing on the petition or in the trial of this cause that there was any such room. Nobody contended that any such room was searched or that any effort was made to search such room. (Transcript, pp.71-86.) The rest of the hearsay statement is to the effect that the party who informed the affiant claimed to have seen liquor in some other room somewhere in the hotel, its location undisclosed, and still undetermined, with no qualifying statement other than that the informant said that the room was at that time, which is undisclosed, occupied by Edith Sorenson. Whether the informant meant that at the time the room was occupied by her personal presence at the moment of seeing the liquor or at some other way or capacity, does not appear.

The second-hand information of the affidavit further relates that the same informant saw whiskey in other rooms of the hotel under the management and control of Edith Sorenson. Where these other rooms were, who they belonged to, whether to transient roomers, permanent guests, to Edith Sorenson personally, or to her husband and family, were left to speculation.

In short, it is entirely obvious that an effort was made to include in the affidavit a description so indefinite and at the same time so sweeping, that the officers might search wherever and whatever they pleased throughout the entire hotel. The only attempt at definite statement concerns Room 207, which was purely mythical. Certainly it cannot be said that this affidavit complies with that provision of the constitution requiring proof "particularly describing the place to be searched", as a condition precedent to the issuance of a search warrant. If the affiant in this matter, or the magistrate, thought that a search warrant could lawfully issue for the search of an entire hotel indiscriminately, it was certainly an easy matter so to state in the affidavit and the search warrant. If it were not intended to do that, then those portions of the hotel to be searched should have been "particularly described" in the affidavit and the warrant. It is no excuse to say that the information coming to the affiant was not sufficiently definite to permit of such a description. It would be bad enough to permit a search warrant to be issued on pure hearsay, but to say in addition that because of scarcity or indefiniteness of information the affidavit for search warrant need not contain the particular description required by the Constitution would certainly be outside all bounds.

A more serious defect appears in the latter part of the affidavit. It ceases to relate even the substance of the information claimed to have been received by affiant and goes on to state "that the affiant has reason to believe and does believe that intoxicating liquor

* * * is being unlawfully possessed, sold and used on the premises occupied by Edith Sorenson as a rooming house and hotel situated in the City of Boise * * * more fully described as follows: that certain premises known as the Vernon Rooms located at 1009½ Main Street, Boise, Idaho, and in particular the rooms thereof, which are directly under the management and control of the said Edith Sorenson and not subleased or let to any particular tenant.”

The entire statement just quoted is purely a statement of affiant's belief. Affiant says he has reason to believe, but he discloses no reason. If it was intended that some reason should be inferred from the statement of his *information* which precedes the part of the affidavit now under discussion, still there appears no ground for his belief. His informant merely told him that he saw some liquor somewhere in the Vernon Hotel. He does not say that his informant told him that any was being sold in or about the place.

The petition filed states, and the demurrer admits, as also did the officers who testified at the trial of this cause, that the only searching done in the hotel occurred in a private apartment occupied by Mr. and Mrs. Sorenson and their son and maintained solely and exclusively as their family home and residence.

“No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house. The term ‘pri-

vate dwelling' shall be construed to include the room or rooms occupied and used not transiently, but solely as a residence in an apartment house, hotel or boarding house."

National Prohibition Act, Sec. 25, Title II.

"It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as a dwelling and such liquor need not be reported provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and of his bona fide guests when entertained by him therein."

National Prohibition Act, Section 33, Title II.

The Fourth Amendment to the Constitution providing against searches and seizures excepting under warrant issued upon a showing of probable cause under oath and *particularly* describing the *place* to be searched and the *things* to be seized, must be liberally construed.

"It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent encroachment upon or gradual depreciation of the rights secured by them, by imperceptible practice of Courts or by well-intentioned but mistakenly over-zealous executive officers.

"They are to be regarded as of the very essence of constitutional liberty.

"The guaranty of them is as important and as imperative as are the guaranties of other fundamental rights of the individual citizens—the right to trial by jury, to the writ of habeas corpus, and due process of law."

Gould vs. U. S., 255 U. S. 304, 65 L. Ed. 650.

Certainly a statute providing the procedure for procuring and serving a search warrant must be construed just as liberally as the constitutional provision upon which it rests. In fact, the statute in question here exempting a private dwelling from search except a showing of fact be made that such dwelling is being used for the sale of intoxicating liquor or that it is used in part for some business purpose, and including in its terms the room or rooms occupied as a residence in a hotel, apartment or boarding house, does not permit of much construction. The language is plain and the exemption created by it is general and extends to all persons having established residences.

The Government saw fit to tender the issue under the petition in question, upon a demurrer; admitting the facts, as the demurrer did, it was contended that there were not sufficient facts to bring the case within the terms of the law just referred to. An examination of the petition (Transcript, 28-33) will disclose that a very full disclosure of the facts was made therein. The use to which the apartment which had been searched was then and theretofore put by the petitioners is set out in full. We are unable to understand just how one could state any more directly or concisely the fact that the apartment, consisting of a dining room, kitchen, living room and bed rooms, was the family residence of the petitioners and their son, that it had been put to no other use and that the specific facts which might authorize a search of such a residence did not exist in that case. The affidavits filed in support of the petition (Transcript, 38-45) set

out very fully the use of that apartment as the dwelling of the Sorenson family. In any event, the fact was before the Court that the rooms constituted an apartment used as a residence, and for no other purpose, and the fact was conceded by the Government. Surely it was not incumbent upon the petitioners, after the Government saw fit to raise an issue by demurrer, to undertake to raise an issue of fact at the hearing on the demurrer. If the facts stated in the petition had been controverted, a different situation would have existed, but since they were not, the petitioners were plainly right in relying upon the Government's admission that the rooms were used as a residence and for no other purpose. It was for the Government to choose the ground for the contest, and having chosen, it should stand thereon.

In his opinion, the Court surmises that there might be cases where the proprietor of a hotel, maintaining his residence in a private apartment within the hotel, might also use such residence for some other purposes. Surely it was not for the Court to inject speculation and possibility into a matter where the Government officers concerned were content to concede the facts as stated.

The apartment which had been searched was plainly protected both by the Constitution and statutes already cited from any such search, at least until the necessary showing had been made in order to procure a search warrant. Also it devolved upon the Government to disclose to the Commissioner who issued the warrant the *particular* place which was desired to be searched.

Further, if it is necessary to go further, the affidavit for the search warrant contains no statement of fact that any intoxicating liquor was being sold either in the residence in question or in the hotel. It does not even say that the residence apartment which was searched was used for any business purpose. The fact is, that a hotel or apartment house is used for business purposes to some extent, at least, by the proprietor thereof, and may contain within it one or more residences. A blanket search warrant for a hotel or apartment house will not permit the search of a private residence located therein.

U. S. vs. Mitchell, 274 Fed. 128.

A statement in an affidavit that affiant has reason to believe and does believe this or that is not a statement of fact at all. The phrase "has reason to believe and does believe" is not a statement of fact, and a search warrant cannot lawfully be issued upon the strength of such a statement.

U. S. vs Rykowski, 267 Fed. 866.

"The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause or there should be a hearing by him with that purpose in view. The immunity guaranteed by the constitution should not be lightly set aside by a mere general declaration of a non-judicial officer that he has reason to believe and does believe, etc."

"The undisclosed reason may fall far short of probable cause."

Ripper vs. U. S., 178 Fed. 24 (C. C. A.).

See also U. S. vs. Ray and Scholtz, 275 Fed. 1004.

“All he swears to is that he has good reason to believe and does verily believe so and so. He does not swear that so and so are true.

“He does not say why he believes; he gives no facts or circumstances to which the judge could apply the legal standard and decide whether there was probable cause for affiant’s belief. There is nothing but the affiant’s application of his own undisclosed notion of the law to an undisclosed state of facts and under our system of Government the accuser is not permitted to be also the judge.”

Veeder vs. U. S., 252 Fed. 414 (C. C. A., 7th Cir.)

In the last case, certiorari was refused.

264 U. S. 75.

As pointed out in some of the cases cited, the law controlling the issuance of a search warrant is no different now than it was before the search warrant statute and National Prohibition Act were passed. The statute was merely declaratory of the practice formerly established and followed.

Nor does it make any difference what may be found in the course of an illegal search.

“An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying on the chance of discovery that the constitutional amendment was intended to protect the people.”

U. S. vs. Slusser, 270 Fed. 818.

It will be observed that the affidavit and search warrant relate exclusively to some unidentified rooms and a certain hotel under the control of Edith Sorenson. But under the issue submitted to the Court, it was undisputed that Carl Sorenson maintained the premises which were actually searched, as the head of the family which lived there. It was also undisputed that the property taken belonged to him. It is quite obvious that the residence apartment was not under the management or control of the wife. The husband had the same right as any other husband to establish, manage and control the family residence. His right to do so and the fact of his having done so in this case would be recognized in the law of domestic relations, or in any other branch of the law. It was the home that was searched and the husband's property that was seized, under a showing and on a warrant directed against premises "managed" and "controlled" by Edith Sorenson, his wife. There was no vestige of a showing that the family residence was to be searched nor that any property mentioned in the affidavit and warrant was being used for the sale of liquor, nor was there any showing that liquor was sold in this apartment at any time, or that any business was carried on there. In this case there existed premises, the most of which was devoted to use as a hotel, having a lobby, a registration desk and rooms for rental to guests; but from which hotel a group of rooms was set apart and excluded for use as a private dwelling. Even a mere roomer in the hotel occupying his room or apartment as his residence, he not being a mere transient guest,

would be entitled to the immunity from search provided by law. Surely the proprietor of a hotel who maintains his private apartment for residential purposes on the premises has at least equal rights with such a guest, be the hotel large or small.

The Court not only sustained the demurrer on the strength of his own surmises and speculation as to possibilities, but later permitted the Government officers who made the search and seizure to testify in full concerning the matter and as to what they learned in the course of the search.

“Nor can any knowledge obtained in the course of an unlawful search and seizure be used in any proceeding against the party whose rights have been so violated. The Constitution covers the substance of the matter as well as its form. The Fourth Amendment is not merely ‘a form of words’.

Silverthorne Lbr. Co. vs. U. S., 251 U. S. 385,
64 L. Ed. 319.

In brief, the affidavit for the search warrant first states hearsay of the most indefinite character as to time and particulars generally, disclosing no facts that are supported by the oath of the affiant or anyone else. It then states that the affiant *believes* certain things. Its entire substance is, therefore, condemned by the statute and by the decisions of our Courts. The warrant itself is equally indefinite, founded on hearsay and belief, and is of such a nature that the officers might search where they pleased. Neither document gives any *particular* description of the place to be searched or the things to be seized. It was, therefore, insuffi-

cient; the whole proceeding was illegal. The property should have been returned to the petitioners, and the search declared illegal. The Court himself even sought to place the petitioners under oath and to examine them himself during the course of the trial on the case which is now before this Court (Transcript, pp. 74-77). Certainly this procedure was unwarranted. As before stated, the Government raised no issue of the fact when the petition concerning the search and seizure was filed. It was not up to the defendants to gratuitously tender any evidence or further proof if the Government was satisfied to accept the facts as stated by the petition or supporting affidavits, or either. The proposed examination by the Court himself could certainly have been nothing more than a sort of exploratory expedition conducted in support of the Government's contentions, and was proposed in violation of their constitutional rights as defendants.

Some of the witnesses testified that there was a buzzer in one of the rooms of the apartment house which sounded when the entrance door of the hotel was opened. They "supposed" that that was for the purpose of calling the person in charge into the lobby to meet the coming guest. We believe it was entirely unwarranted and unlawful to permit these witnesses to testify at all, but even so, surely the presence of a buzzer in the house of a storekeeper located close to his place of business which would apprise him in his absence from the store that a customer had entered the place of business would not strip his residence of its character as a dwelling place. If so, then the tele-

phone in the house of an attorney at law by which he is frequently called to his office by a client would seem to constitute his residence a part of his law office.

Nowhere in the evidence offered by the Government in this case concerning the Vernon Hotel is there any suggestion that any business whatever was ever transacted in the private apartment of the proprietor or that any liquor ever was sold there. Up to the date of this writing there has been no shadow of proof of the existence of either one of the two conditions, one of which at least must exist before a search warrant can lawfully issue against such a residence. If we were to assume, therefore, that the affidavit and warrant in this case had been specially directed against the apartment in question, still there was no showing to justify such a warrant and there has not been any showing, either then or at the trial of this cause, that any facts existing which would have justified such a warrant if they had been properly shown by affidavit as required by law. We submit that the search and seizure was illegal and that the subsequent admission in evidence of the property seized and the subsequent testimony given by the officers who made the search, constitute prejudicial error. And we submit that this error extends not only to the case of Carl Sorenson, one of these plaintiffs in error. The other plaintiffs in error indicted with him for conspiracy must necessarily have been prejudiced by anything so vital as the error which occurred here. It is impossible to say how far such prejudice would operate against any or

all of these plaintiffs in error, but it is absolutely certain that it must have operated seriously to their detriment. We submit that this point alone is enough to require a reversal of the judgment in this cause. It will be noted that the indictment itself, in each of the first three counts (Transcript, pp. 7-23) sets out as against each and every of the defendants the presence of intoxicating liquor in the Vernon Hotel as one of the overt acts in furtherance of the object of the conspiracy. The proof of that overt act is the evidence just discussed, obtained by unlawful search and seizure. We submit that the judgment should be reversed.

See also:

Central Consumers Co. vs. James, 278 Fed. 249.

Citing many authorities.

U. S. vs. Armstrong, 275 Fed. 506.

Giles vs. U. S. (C. C. A., 1st Cir.), 284 Fed. 208.

V

Assignments Nos. 24, 26, 32, 33, 34 and 42. In all of the assignments mentioned, reference is had to testimony of conversations admitted over defendant's objection, in which it was claimed a variety of different matters were discussed, none of which had any relation to the charges against the defendants nor were they in any way connected by other evidence to show their materiality. One of these concerned an alleged conversation between Dr. Goodfriend and Chief of Police Griffith, concerning Ed Hill, a detective, relating to some place known as "Jap's Place", not shown

to have anything to do with the case on trial. Apparently the only purpose served by the conversation was to bring into the case the mention of gambling in connection with Plaintiff in Error Goodfriend. In a most prejudicial manner, the same subject was gone into later, as pointed out in a later assignment. Such repetition is strongly indicative of design rather than accident. (Transcript, pp. 138-141, 243-246, 384-386.)

Another instance relates to a supposed conversation between Dr. Goodfriend and a man unknown to the witness, concerning interference with the Doctor's telephone line (Transcript, p. 193). What possible relation this could have, except as a mysterious suggestion that the Government might, if it chose, prove a great deal more against the Doctor, is hard to understand.

Another instance is the testimony of Witness Kuchenbacher that the Doctor told somebody he expected to clean up some money and talked about going to some world's fair. The party to whom he was talking was unknown to the witness. (Transcript, p. 246.)

Another instance relates to the Doctor's alleged conversation with unknown parties concerning someone by the name of Gill and another called George. Again the witness persisted in referring to the subject of card playing. (Transcript, pp. 247-248.) A little later the Government offered evidence that the Doctor asked one of his patients to deposit \$110 at the bank; and that on a later date the Doctor asked him to make a deposit of either \$140 or \$150. When objected to, the District Attorney stated that the Government

could show a lot of other deposits and prove the making of them by the bank's records. The evidence offered was objected to, which objection was overruled. (Transcript, pp. 262-263.) The offer to show other deposits never materialized, and no connection was ever shown.

In another instance (Transcript, 338) a discharged policeman was called to testify that he had been discharged. A motion was made to strike out his testimony as immaterial, which was denied (Transcript, p. 339.) It was not shown who discharged him or why he was discharged.

These matters may be, and no doubt are, comparatively unimportant as compared with the more outstanding features of the case; but a continuous succession of error, as we believe these matters to be because of their lack of connection, will eventually overload any defendant in any criminal case. Error is presumed to be prejudicial until the contrary appears beyond doubt.

Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465.

Ayer v. N. Mex. 201 Fed. 497.

Pettine v. N. Mex. 201 Fed. 489.

Sprinke v. U. S. 150 Fed. 56, 51 L. ed. 922.

Todd. v. U. S. 221 Fed. 205.

Certainly the persistent attempt to characterize Dr. Goodfriend as a gambler was prejudicial. He was not being tried for gambling, nor was his defense attempted to be supported by evidence of good reputation, nor were the references to gambling shown to have the faintest

semblance of relation to the charges against him. We submit that the errors multiplied to a point where it must necessarily have prevented Dr. Goodfriend from having a fair trial.

Boyd v. U. S. 142 U. S. 450, 35 L. ed. 1077.

VI

Assignment No. 44. As to Defendant Griffith and his alleged connection with the conspiracies, the defense attempted to show that he had not tried to interfere with law enforcement by his patrolmen. It must be obvious that this was an important matter to the defense as well as to the prosecution. It was the Government's theory, and proof was attempted, that the Chief of Police and Captain of Detectives, together with the Sheriff's office were brought into a conspiracy to afford "protection" (Transcript, pp. 321-322). The Chief's attitude toward enforcing laws, and particularly toward the hotels and rooming houses in which it was claimed the illicit liquor was to be handled, became a very important consideration. When it was attempted to be shown that he had not influenced the police force to disregard lawlessness of the sort in question, the Government's objection was sustained (Transcript, pp. 391-393). It was finally agreed that the Chief had given no orders concerning rooming houses, but the Court's ruling as to his instructions on the subject of the liquor laws was allowed to stand and the record in that regard was left unchanged. We submit that the attitude of the Chief and his instructions in regard to the liquor laws should have been

gone into fully, and to refuse an offer of such testimony was erroneous.

VII

Assignment No. 16. In regard to the Vernon Hotel, supposed to be an outlet for illicit liquor, in charge of the plaintiff in error Sorenson and his wife, who became ill at the outset of the trial, the Government was permitted to put in evidence the fact that an abatement action was commenced against the Vernon Hotel some two or three weeks after the search of that place already referred to (Transcript, p. 92). We think that this was prejudicial, since it was on a par with proof of a different offense for the purpose of convicting of the offense for which Sorenson was being tried. This is probably one of the small matters which we have mentioned before, but nevertheless it added so much more to the defendants' handicap.

VIII

Assignment No. 43. This assignment relates to a direct inquiry made following several statements by witnesses concerning gambling as related to Dr. Goodfriend, in which the District Attorney, over the Doctor's objection, went into the question of his reputation for gambling and in his question dubbed him a professional gambler (Transcript, p. 92). We have already alluded to this matter in connection with earlier references to gambling as being apparently the culmination of a series of such references designed to prejudice the jury against Dr. Goodfriend.

IX

Assignment No. 17. The Government was allowed to put in evidence two newspapers bearing dates of March 16 and March 23, 1922, as found in the house on J. H. Evans' place, where a still was seized together with some liquor, and the defendant Kemp arrested, on January 15, 1923, nearly a year later. (Transcript, pp. 95-98.) Obviously, a newspaper current in March, 1922, and at that time addressed to the defendant, should not be accepted as evidence connecting him with a place claimed to be the scene of a crime nearly a year later. Unless further connection was shown, it would certainly be unfair to such defendant to submit them as showing that he had something to do with the crime committed on premises which had never been occupied by him at any time and which crime was committed a long time after the date of such newspapers. In fact, the Government did not even attempt to show that Dr. Goodfriend ever received the papers in question. They were found at a place, an acreage tract adjoining a similar tract on which he lived, and for aught that appeared might have been delivered there originally by mistake, or might have found their way there in any number of ways entirely disconnected from his activities. We think unquestionably the admission of such papers into the case was error and it is undeniable that nothing whatever was shown thereafter to connect them with the case.

X

Assignments Nos. 5, 6, 7, 8 and 9. In the opening of the case, the Government was allowed, over objec-

tion, to go at great length into the alleged sale of a bottle of liquor by a woman named Etta Goldsbury. It was evidently the Government's theory that the Defendant Ed Ward controlled the Union Rooming House, and used it as a place for the disposal of liquor said to have been manufactured by the defendants. However, the Government's evidence (Transcript, p. 59) showed that he had nothing to do with the rooming house except that he had a room there. The Government proceeded, however, to put on the witness stand a number of witnesses who testified concerning Etta Goldsbury and her arrest (Transcript, pp. 59-71). One of these said that he bought some liquor from her in the Union Rooming House; another said he was present when it happened; one said that the Defendant Ed Ward was there in the rooming house, but he didn't think anyone saw the transaction of the purchase but himself and Mrs. Goldsbury. This is the only mention of the Defendant Ed Ward in that connection. Then the former Prosecuting Attorney of Ada County was called to testify as to a conversation he had with the two preceding witnesses when they were in jail. In what fashion this was connected with the charges against the defendants we are unable to gather. It was not claimed that Ed Ward sold any whisky, and the Government witness said he did not think that anyone saw the transaction. It is not claimed by any witness that Ed Ward knew anything about the transaction. We submit that the objection to this testimony should have been sustained, and that the reception of the testimony was error, particu-

larly as to the defendant Ed Ward and to a less degree but substantially so, as to his co-defendants indicted for conspiracy with him.

XI

Assignment No. 27. This assignment deals with the refusal of the Court to permit the witness Marie Curtis to be cross-examined concerning the relations of her husband and herself with the organization known as the Ku Klux Klan.

The witness testified (Transcript, pp. 178, 199) that she had talked to Dr. Goodfriend in his office on several occasions. She was asked (Transcript, p. 237) about a particular conversation and as to whether she did not have a quarrel with Dr. Goodfriend on the subject of the Ku Klux Klan. The Court sustained the objection and an exception was taken. It would seem that in view of her other testimony, Goodfriend had an assured right to inquire further concerning the conversations which she said she had had with him. He also had a right to show this incident as creating upon her part a motive which might very possibly result in coloring her testimony against him. It is not impossible that it might even have been the cause which accounted for the notebook which she had so assiduously prepared in order to testify against him and some of his associates in this trial. We are aware that matters such as this stand largely each upon its own merits, but we submit that it was error to deny Plaintiff in Error Goodfriend the right to inquire further into the matter which the witness herself had suggested,

more particularly since the matter inquired about bore with special significance upon an antagonistic relation which, if the matter in the question were admitted by her, arose just about the time that she claimed to have commenced preparing her statement for use against him.

The Court likewise refused the defense the right to inquire into the activities of herself and her husband at various points in Idaho and Oregon in connection with a Mr. Burger, a lecturer for the Klan. (Transcript, pp. 202-203.) The Court likewise refused to permit her to be examined concerning her interest in one Jackson, who had been the opponent of Plaintiff in Error Agnew for nomination for Sheriff in the primary election during the preceding summer. (Transcript, p. 206.) This matter of the primary had been gone into over the defense's objection, very fully, by the first witness called by the Government. (Transcript, pp. 54-59.) It was one of the matters which the Government relied upon as showing the origin of the alleged conspiracy between Dr. Goodfriend and Sheriff Agnew and his deputy, Plaintiff in Error Kinney. If Goodfriend's activities in that campaign, and in connection with the Sheriff thereafter during the following election, were important, it was certainly of equal importance to go into the question of the interest of the chief witness against him in the same, and its source. It was very possible that enmity toward Dr. Goodfriend and Agnew on the part of this woman had its origin in the fact of her and her husband's association with the Ku Klux Klan organization and its sup-

port of the defeated candidate. It is matter of common knowledge that such political feuds sometimes result in the taking of extreme measures of retaliation. We think the defense had the right to inquire, at least, as to the affiliation of this witness and her husband, and as to the effect, if any, such affiliation had on the witness's attitude toward Dr. Goodfriend and Sheriff Agnew. Again the matter must be judged largely on its own merits; but we believe that the defense's right of cross-examination was erroneously restricted, and the rights of Plaintiffs in error in that respect invaded by the Court's ruling. It is elementary that such a course of inquiry must have a beginning and no one question can indicate to the Court the full purport of such examination. Certainly the defense should have been permitted to lay the foundation, in a preliminary way, by inquiring into this woman's affiliation and her husband's feeling toward some of the plaintiffs in error. An offer of proof was made and refused. Whenever the subject was mentioned, an objection was immediately sustained without any inquiry as to the purpose or the scope or direction to be taken by the proposed line of questions. (Transcript, p. 231.)

These matters are of serious import, and taken together with a similar course of ruling by the Court, it seems to us quite obvious that the defendants were deprived of a fair and reasonable opportunity to present their defense and to disclose the motives which led to the voluntary effort on the part of this woman to create against plaintiffs in error a case upon which they could be indicted and convicted. Prejudice therefrom, as before shown, is presumed.

XII

Assignments 38, 39 and 40. These assignments refer to the Court's refusal to permit plaintiffs in error to inquire of the witness Paul Reynolds as to whether the search of the Vernon Hotel, already discussed in this brief, was brought about on account of information obtained through the espionage conducted at Dr. Goodfriend's office, or by other means. (Transcript, pp. 287, 289.) The witness Paul Reynolds had testified (Transcript, pp. 284-285) that he heard some conversation between Dr. Goodfriend and Mrs. Sorenson originally a defendant in the case, in which whiskey was mentioned and mention was made of Room 207 in that connection. The witness Paul Reynolds also testified theretofore (Transcript, pp. 84-86) to having participated in a search of these premises. Other witnesses had also testified on the same matter. It was an essential part of the Government's theory of the case, and of its contention to the jury throughout, that the Vernon Hotel was the principal source of outlet for the illicit liquor claimed to have been contemplated by the conspiracies charged against the defendants. From the Government's standpoint, and as its case was presented through the evidence, the inference arose, which the jury would be admonished by the Government attorneys to draw, that the Vernon Hotel as such a medium of distribution was discovered through the conversations overheard at Goodfriend's office. At no time throughout the testimony was any other explanation given. Therefore, it was a fair question on cross-examination of this witness, who had himself pro-

cured the search warrant, whether or not the information which he claimed to have gotten at the Doctor's office led to that search, or whether such search was caused by facts learned otherwise. If the latter, the inference above mentioned would have been precluded, because the ground for drawing it would have been destroyed. The witness stated that he made an affidavit to secure the search warrant, stating there in his information; he was asked whether he relied upon any other information than that in the search warrant. This he was not permitted to answer. We assign this as error affecting one of the vital features of this case, that is, the Government's theory of the connection of the Vernon Hotel with the conspiracies and illicit operations charged against these plaintiffs in error.

XIII

Assignments Nos. 18 and 45. The witness Paul Reynolds testified to searching the ranch of J. H. Evans and to finding a still, some liquor and other properties, and arresting Ed Kemp, originally one of the defendants herein; after testifying fully as to this (Transcript, pp. 95-98) on cross-examination he was asked (Transcript, pp. 99-100) concerning the affidavit which he himself had made to procure a search warrant for the Evans ranch. A certified copy of the search warrant was shown him and he identified it as the copy which he served upon the occasion of that search. He was asked whether his statements in the affidavit as to the information which led him to procure the search warrant were correct. The Court stated that unless he

remembered, he could not properly answer. However, there was no claim made by the witness that he did not remember, the lack of memory being merely a surmise by the Court. We submit that it should have been left to the witness to answer it if he could. No one else was competent to state, and much less was the Court competent to surmise, that he did not remember.

Later (Transcript, pp. 396-401), the United States Commissioner who issued the Evans search warrant was called to the stand by the defense, the original record of the affidavit, the search warrant and the return attached thereto shown to him as Exhibit 34, and he was asked to and did identify them. The affidavit was offered in evidence, and the Court's attention called to the fact that the defense had attempted to examine Paul Reynolds, the maker of the affidavit, earlier in the trial; and counsel explained that the offer was of an original record of a judicial proceeding and was the best evidence to show upon what grounds the Evans search warrant was issued. The affidavit (Transcript, p. 397) stated that Paul Reynolds had been informed by reliable parties who had stated to him that they had seen several automobiles going to the Evans house at various times of the day and night with the lights on the automobiles extinguished before approaching said house, and that the informant had seen a dim light in one of the rooms of the said house, and had detected an odor of mash and whiskey on the place; and that said parties had informed the affiant that they had seen barrels and other equipment

such as is used for the manufacture of intoxicating liquor hauled to the premises.

The offer, however, was rejected. The Court was apparently of the opinion that the judicial record offered could serve no purpose except to impeach the witness Paul Reynolds. His ruling was very definitely that the evidence was not admissible as the best evidence of what caused the Evans search.

We submit that the original record is the best evidence of what occurred in that judicial proceeding. And since it was very patent that the Government was contending, and did contend, as in the search of the Vernon Hotel, that the Evans place was searched as a part of the development of the case against these plaintiffs in error, brought about by the conversations claimed to have been overheard at the Doctor's office; the inquiry became very pertinent as to whether the still on the Evans place was connected with the alleged conspiracy by means of information so obtained, or by other means.

We believe that it is beyond argument that the judicial record made before the Commissioner and by him returned to the Court under which he held his authority, and which related to one of the fundamental aspects of this case, was the best evidence of what led to the Evans search. We think it is equally well assured that not even the maker of the affidavit would be allowed to impeach that record, which he himself had caused to be made. Neither he nor anyone else had claimed that such information as was related in that record, the affidavit for the search warrant, had

been obtained at the doors of Dr. Goodfriend's office not from any conversation of any defendant or in any other manner connected with the defendants. In substance the information which he related in that affidavit would have been a distinct addition to the evidence in this case, as showing very plainly that the connection of the still on the Evans place with these defendants never occurred to anyone concerned in making the case against them until after the raid of the Evans place on January 15, 1923. Under the Court's rulings, the defense was not permitted to offer this record, nor was it permitted to inquire of the maker of the affidavit whether he had other information not stated in the affidavit which figured in bringing about the search of the Evans place.

That the record of the judicial proceeding concerned was the best evidence as to what caused the search warrant to be issued, see the following authorities:

Baskin vs. U. S., 209 Fed. 740.

22 C. J. 799, Sec. 910.

Elliott, Evidence, Secs. 570, 618, 212.

Wigmore, Evidence, Sec. 1335.

Selph vs. Selph (Ga.), 65 S. E. 881.

Coombs vs. Cook (Okla.), 129 Pac. 698.

Coal Corporation vs. Steinman, 223 Fed. 743.

Ray vs. Law, Fed. Cas. No. 11, 592.

We submit this as further error, an error which was prejudicial. The plaintiffs in error were charged with violations of the Internal Revenue Laws on the subject of distilling, and several of the overt acts set forth in the conspiracy counts against them specifically re-

lated to the property found and seized upon the Evans place. The only evidence touching the question of distilling, or of setting up a still or manufacturing liquor in any way, was the evidence of the seizure of this apparatus. The Government sought to establish at least by inference from the testimony of Curtis and Kuchenbacher, that this still was set up and operated by the plaintiffs in error, and that its presence was discovered and later uncovered by listening to conversations at Dr. Goodfriend's office. The affidavit plainly showed that such was not the fact, but that the search and seizure and the arrest of the defendant Ed Kemp were brought about by information entirely different than anyone claimed to have received through the door of the Curtis rooms.

Crawford vs. U. S., 183, 53 L. Ed. 465.

We believe there is no question that the Court's rulings complained of in the assignments of error here involved were erroneous and prejudicial to the rights of plaintiffs in error.

XIV

Assignments Nos. 25, 28, 29, 30, 31, 36, 37 and 41.
In the foregoing sections of this brief a number of matters have been discussed under Assignments of Error which we believe to have operated to the prejudice of the plaintiffs in error. In a number of instances, we have candidly said that we do not contend that any *one* alone of the minor features of the case, assigned as error, would be sufficient to justify a re-

versal of the judgment, but we submit that a succession of errors, even in minor matters, constitutes in the aggregate a burden which a defendant should not be called upon to bear. In the assignments already discussed there are several outstanding features which, as we have there indicated, we believe to be ground for reversal, each in itself alone. There are a number of others which we believe to have had a cumulative effect which could not but have prejudiced the defendants very seriously in the eyes of the jury.

17 C. J. 368, Sec. 3751.

People vs. Harris (N. Y.), 102 N. E. 546.

People vs. Becker (N. Y.), 104 N. E. 396.

State vs. Shafer (Mont.), 55 Pac. 526.

State vs. Dolliver (Minn.), 184 N. W. 848.

We come now to one of the outstanding features of the case, which deals with the very substance and essence of the evidence which constituted the heart of the Government's case. We refer to the testimony of Marie Curtis, Oscar Kuchenbacher and Paul Reynolds (Transcript, pp. 128-238, 238-277, 277-291.)

1. The witness, Marie Curtis, testified that she, not as an officer, but as a volunteer and without any compensation or promise of reward from any source, conducted a system of continuous espionage upon the occurrences in the office of Dr. Goodfriend by looking and listening at a door connecting one of the rooms in which she lived with Dr. Goodfriend's private professional office. She stated that the first conversation she listened to occurred in December, 1922, and that

about December 29 she commenced taking notes of what she saw and heard, under the direction of the Assistant District Attorney. She professed to testify from her unaided present recollection concerning certain conversations, the presence of certain parties in the Doctor's office, and other details, at two or three times in December. Beginning with December 29th and from then on throughout January and February, up to the date of the indictment herein, she professed to have continued her operations and on each occasion after listening to the conversations or observing transactions in his office, while her recollection of the matter was still fresh and accurate, to have written in notebooks, of which she produced a series, a record of what she saw and heard. Repeatedly she was examined as to how, when and under what circumstances she made these notes. (Transcript, pp. 128-238; as to examination concerning her notes, see pp. 133-138, 203, 211, 216.)

Repeatedly her testimony was objected to upon the ground that she was not testifying to any recollection of her own, but was merely reading from her notebook a narrative statement which she herself had written; that the notes were incompetent, and not properly verified and guaranteed. (Transcript, pp. 137, 153-154, 157-161.)

At the outset of her testimony she was directed by the prosecutor to refresh her memory from her notes and after having done so to state what she saw and heard (Transcript, p. 138). However, later during her direct testimony it was conceded by the Court that

she was not testifying from any present recollection, but was reading, or substantially so, the statements which she had written in the group of notebooks from which she was testifying. (Transcript, pp. 157-161, 185, 192, 193.)

The Court ruled that this procedure was permissible, although holding that the notebooks themselves would not be admissible. (Transcript, p. 137.)

Before the end of her testimony, the prosecutor himself directed her to "read from her notes". (Transcript, pp. 178, 182.)

In her cross-examination she stated repeatedly that she had no present recollection of the matters about which she had testified; that while she might be able to state a very little here and there, she could not testify concerning the matters and things which she had professed to state in her direct examination, except as those things appeared in the record which she had prepared in her notebooks. (Transcript, pp. 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 216, 217, 219, 220, 222, 223, 224, 226, 227, 228, 230, 233, 235, 236.)

Motion was made eventually to strike her testimony concerning the first conversations she claimed to have heard, on the ground that it was incompetent and that she was devoid of any recollection concerning the matters according to her own statements and that it had then developed that she was telling what she remembered about some of her notes which she had written at a former time, but had not produced, and that such matter was not competent evidence. This motion was denied. (Transcript, pp. 211-212.)

To all of the adverse rulings as above referred to as shown, exceptions were taken and allowed. All exceptions inure to the benefit of all defendants (Transcript, p. 55).

The witness also testified (Transcript, pp. 135-137, 210) that in writing her notes she had not set down in them the full conversation and details which she had heard and observed, but selected therefrom such data and such portions of the conversation as in her opinion pertained to this charge against these plaintiffs in error, which was to say, obviously, that she claimed to have set down in her notebooks such details as she thought would serve as evidence against plaintiffs in error and perhaps convict them of the proposed charge against them. She admitted that it was her purpose to gather evidence against them and that she was instructed to do so. (Transcript, pp. 133, 217-218.)

We submit that there is no rule or law of evidence concerning the use of memoranda by a witness or its use as evidence in Court which will uphold the procedure had in this case or which will support the rulings of the Court in the course of this trial. In the first place there is at least a very grave doubt whether memoranda such as this can be used in our Federal Courts for any purpose other than to refresh the recollection of the witness. While our Supreme Court has never positively established such a rule, it has refused to commit itself to any other, and has on several occasions discussed the question here involved. It has recognized that among our State Courts there is a divergence of opinion as to how and in what manner

such memoranda may be used, and in stating that divergence of opinion it has correctly stated the two rules recognized in the State Courts and by the text-book writers, neither one of which justify the procedure which was had in this case.

In *Vicksburg Railroad Company vs. O'Brien*, 119 U. S. 99, 30 L. Ed. 299, which was a case for damages on account of personal injury, the plaintiff had been permitted to read to the jury a statement of the injury and condition of plaintiff and a prognosis of the patient's case written some time before, shortly after the injury, by the physician in charge. In discussing the matter the Supreme Court said:

“We are of the opinion that this ruling cannot be sustained, upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it.

“But there are adjudged cases which declare that, unless prepared in the discharge of some public duty or of some duty arising out of the business relations of the witness with others or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence. There are, however, other cases, to the effect that where the witness states, under oath, that the memoranda was made by him presently after the transaction

to which it relates for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper will be received as the best evidence of which the case admits.

“The present case does not require of us an examination of numerous authorities upon this general subject; for it does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs were allowed to read the physician’s written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous.”

On a later occasion the Supreme Court referred again to the same matter. A list of certain securities owned by a witness from time to time had been offered in evidence. On cross-examination the witness testified she did not remember just when the various items were put down, could not recall what some of the figures referred to, that some of the entries were not reliable, that she did not remember the circumstances under which they were made. The memorandum was not used for the purpose of refreshing the witness’ memory, but was admitted as evidence before the jury to show the character and value of the securities there listed.

After discussing the question and referring to certain earlier decisions of the Supreme Court having some slight bearing on the question, the Court discussed *Vicksburg Etc. Co. vs. O'Brien, supra*. The Court then said:

“We do not regard any of these cases as committing this Court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness.”

In a case decided in recent years by the Circuit Court of Appeals of the Eighth Circuit these facts were considered: A revenue collector had been sued for recovery of money paid under protest, and at the trial a revenue agent was permitted to read from a diary conversations, including questions and answers, which he claimed to have had with the plaintiff. Objections were made and overruled. The Revenue agent did not state whether he had any recollection of these matters or not, neither did he claim that his memory was in any way refreshed by the notes from which he read. Whether or not such notes could have refreshed his memory to the extent qualifying him to state such conversation, questions and answers, was not disclosed by the evidence. The Court held that permitting his memorandum to go to the jury by the medium of reading it was error and the case was reversed on that ground. The Court cited in its opinion the opinions of the Supreme Court above quoted from.

De Witt vs. Skinner, 232 Fed. 443, 4.

In *Parsons vs. Wilkinson*, 113 U. S. 656, 28 L. Ed. 1037, the Supreme Court held that memoranda made twenty months after the transaction was inadmissible as evidence, although the witness testified that *he knew it must have been correct when he made it*, but had no present recollection of the matters recorded in the memoranda.

It will be noted from the above that the Supreme Court has been able to discover but two uses for such memoranda, namely, its use to refresh the recollection of the witness so that he may testify to a *present* recollection of past facts and, second, the introduction of the memorandum itself as a record of the witness' recollection of facts known at some past time, when the memorandum was made; in the latter case it is necessary, according to the decisions, to show that the witness knew the record was correct when he made it and that he has no present recollection of the matters recorded there from which he can now testify independently; and on looking into the recognized authorities on the question, it will be found that such are the rules. In those jurisdictions where memoranda prepared at a past time from a witness' then recollection, concerning matters which he is now unable to recall, can be used at all, the memorandum itself is the evidence, and *if properly authenticated and vouched for by the witness* may in some jurisdictions be placed before the jury *in lieu* of a *present* recollection of these matters by the witness himself.

Mr. Wigmore, in his work on Evidence, discusses this matter very fully. *Wigmore, Evidence, Vol. 1*,

Secs. 725-764. He points out, with very full citations of authority from all jurisdictions, that in dealing with the two forms of recollection, that is, a present recollection by the witness and a past recollection which was at a former time reduced to writing, a marked difference between the two has been recognized in all jurisdictions. A witness undertaking to testify as to a past recollection, that is, undertaking to tell that which he claims once to have known but now to have forgotten, must necessarily do one of two things: he must refresh his memory from some source, usually from some writing, or he must produce and verify a *record* of that which he once knew and substitute that for any present recollection of the facts. In the latter case he does so "by employing some record of this past recollection and adopting it as his present statement". It is also pointed out that where a present recollection is testified to, the Court may well accept imperfect and incomplete recollection of the transaction, conversation or the like because nothing better is available.

Wigmore, Section 745:

"But where the witness goes back to a past recollection, which can less easily be tested by cross-examination, he may properly be asked for something more decided—something of the quality satisfactory in itself and not merely the best available."

Idem:

"Again, a memorandum of that which the witness once knew but is now unable to recall, to be acceptable as evidence must be a *faithful* memorandum."

Wigmore, 738:

“And the Court must make sure that the recollection which the witness had at the former time was *accurately* represented in the memoranda then made.”

Idem, Section 746:

“The witness must be able now to guarantee that the record *accurately* represented his knowledge and recollection at the time.”

Idem, Section 747:

“In the first place, it must make sure that this recollection was *accurately* represented in the record or memorandum then made; here several situations present themselves for solution.”

From all of the foregoing authorities, it is very apparent that, as stated at the outset, there are two ways of using memoranda of a past recollection. One is to use it to refresh the memory of the witness if it will serve to do that. The other is to properly verify and *guarantee by the testimony of the witness* the record or memoranda as made while the witness' recollection was fresh at or near the time of the transaction or circumstances recorded, and *that the record so made accurately and faithfully recorded the witness' knowledge at that time*; and having done so, to offer the record itself as a substitute for testimony by the witness.

It is more than obvious that neither procedure was followed in this case. The testimony of the witness, Marie Curtis, starts out with a pretense of refreshing her recollection; but she herself disclaimed that she did

or could refresh her recollection so as to be able to state the matters about which she was asked from a *present* recollection of them. This must certainly be accepted as the state of her recollection and of her mind at that time. The Court eventually ruled, as pointed out above, that she could consult her notes and state to the jury what she found written there, and stated repeatedly in the presence of the jury that that sort of evidence was much better than the recollection of a witness. In fact, the jury must have been impressed by the repeated statements of the Court that the notebooks which the witness held in her lap were little short of infallible. The Court permitted the witness at times to read from her notebook, and at other times she, ostensibly at least, looked at the notebook and told the jury in other language what she found written there. It can hardly be contended that there is any distinction between submitting the books themselves or permitting the witness to read what was written there. At least there is no distinction which amounts to a difference. And to permit her to look at the notebook and then state to the jury, in such language as she at that moment chose to select, not any present knowledge of her own, but what she considered to be the meaning of the writing which she found, only made a bad matter worse. It should be borne in mind at all times that the witness, by her own statement, was without any present recollection of the conversation, parties present, times and other details about which she professed to testify. The books themselves were not offered in evidence and in fact the Court states, as

shown above, that they would not be admissible if offered. So we have a situation where the chief witness for the prosecution on the trial of a most serious charge of crime was permitted to testify without any present recollection of the matter which she stated, by sometimes reading and sometimes, as it were, translating, the contents of some notebooks which she herself had written at a former time. The notebooks themselves were never offered to the jury, and so the defendants had no opportunity to object to the books or their contents going into the evidence.

To resume, it is at least very doubtful that the memoranda or a verbatim reading of it could have gone to the jury as evidence, in view of the decisions of the Supreme Court above cited. And as stated, under the authorities either the witness must have qualified so as to possess a *present* recollection of the matter about which she testified, or the Government must have relied upon the memoranda itself as a substitute for her present recollection of the facts. We believe the authorities cited and quoted from admit of no other conclusion; and we believe that, as stated by the Supreme Court, the authorities are all to this effect. We submit that it was error to permit this memoranda to be used as it was used, partly read and partly translated into other language of very possibly different meaning, under the authority of the Supreme Court above cited.

But the matter does not rest here. The error complained of is graver and the rights of the plaintiffs in error were invaded to a greater extent than already

indicated. As shown above, the witness confessedly made no attempt whatever, when writing her notes from time to time as she claimed, to set down a faithful and accurate record of what she had heard and seen. She admitted that she did not record the full conversations, but selected from them such parts as she thought would be material as evidence against these plaintiffs in error. Could anything conceivable tend to a more vicious abuse of our Courts than to permit a volunteer witness to establish a system of spying upon other people, listening to their conversations, and then, for the purpose of building up a case against them upon which they might be prosecuted and convicted of crime, to set down in notebooks and offer in evidence as "*faithful*" records the parts and parcels of conversations heard and of events observed, selected with a view expressly to building up a case against them? As pointed out above by Mr. Wigmore, a witness who appears in the capacity of one having no present recollection, but who claims to have had a past recollection which was at that time reduced to writing; and who thereupon undertakes to substitute such record for his own testimony presently given; hedges himself about in such a manner that he is absolutely immune to cross-examination. One might as well attempt to cross-examine his note-book. In fact, the notebook and not the person *is* the witness. It is impossible for the defense to cross-examine such a person. And as the Courts have long recognized, the least that should be expected of such a person is that he or she shall be able to state of his or her own pres-

ent knowledge that the record so prepared did faithfully and accurately embody what the witness then knew to be the conversation or happening recorded. Surely to be an accurate and faithful record, such memoranda must state *fully* what the witness knew and remembered at that time. In this case, by her own statement, the witness deliberately substituted her own judgment, or very possibly her own desires and caprice, for the discretion which a Court is supposed to exercise in admission of testimony and for the construction which a jury is supposed to place on a conversation and other matters with which her testimony dealt. She selected what she chose, wrote it in her own way, and so built up a continued story which constitutes probably one of the most remarkable pieces of testimony that has ever been offered in any Court. Plaintiffs in error, on the other hand, were compelled to come before the Court, having been denied a bill of particulars, and sit through long day sessions followed by night sessions, and with almost no chance to reflect upon the matters with which this testimony dealt, relying upon their unaided memory of the multitude of past events and transactions as against the finished and polished narrative contained in the notebooks of this woman and built up by her out of selected portions of conversations and incidents. Admittedly this narrative was written for the purpose of charging and convicting these men of crime. The jury was deprived of any opportunity to consider the other things which were said and done by these and other persons in the various conversations as characterizing the meaning

and motives involved. and were restricted to the consideration of what this witness, in the exercise of her own judgment or desires in the matter, had at a former time chosen to prepare for their edification. Again we say that no course of action could conceivably trend more certainly and viciously to the abuse and misuse of our courts of justice than that followed by this woman. Such memoranda should not be used.

Downs vs. Downs (Iowa), 101 N. W. 431.
22 C. J. 896.

We wish again to point out that the evidence under discussion was not offered by either one of the authorized and accepted methods. The offer was neither of the testimony of the witness from her present recollection, refreshed or otherwise, nor was the record claimed by her faithfully and accurately to embody her recollections at a past time. Obviously, she was not competent to testify from any present recollection, and no offer of the record of her past recollections, that is, of her notebooks, was made and no objection to such an offer was, therefore, possible to the defense. Her testimony consisted of a statement in part of what she conceived the record of her past recollection to mean. The Court made it very plain to the jury that in his judgment the record which she held before her was the very best evidence which could possibly be offered in a case of this kind. All the while the Court was referring to the notebooks themselves; but they were withheld and kept in the possession of the witness. They were never shown to the jury nor was any at-

tempt made to place them in evidence for that purpose.

And finally the witness was allowed to tell the jury what appeared in the notebooks, which were made up of matters which she herself had *selected* out of a great mass and variety of conversations which she had spied upon and which she had worked into a story of her own composition, suspiciously complete when considered as an ostensible record of portions only of such conversations. The record which she told the jury about and part of which she read verbatim was neither accurate nor faithful, was not intended to be when made, but on the contrary was intended to be such a record as would serve to convict these plaintiffs in error of the crime. It is a matter of common knowledge that portions of conversations taken from their context are necessarily misleading. If a witness were to appear in person, and upon being asked to state a conversation should state such parts of it as he chose; and being asked on cross-examination whether there was more to the conversation, should reply affirmatively; upon then being asked to state the full conversation should reply that he did not care to do so because the rest of the conversation had nothing to do with the case on trial, that testimony would be comparable and exactly the equivalent of the matters contained in Mrs. Curtis' notebooks. These notebooks being a partial statement of what she formerly knew or claims to have known, are the equivalent of direct testimony by her from a present recollection, as to parts of the conversation. Deliberate omission by her of the rest of the conversations she listened to and other matters which

she observed is the equivalent of her refusal to state the balance of the conversation presently in her own recollection on the grounds that it has nothing to do with the case on trial. If any Court should sustain a witness in such a position, we apprehend that a Court of Appeal would make short work of reversing a judgment of conviction of crime in such a case. That is precisely what occurred here through the deliberate and intentional action of the witness, Marie Curtis, and we submit that the judgment should be reversed.

2. *Assignments Nos. 30 and 31.* These assignments deal with the testimony of Witness Kuchenbacher (Transcript, pp. 238-277). Much of what has been said concerning the testimony of Witness Curtis applies equally to the testimony now under discussion. The witness testified (Transcript, pp. 239-245) that he made some notes of various conversations, which he claimed to have listened to through the same door referred to in the Curtis testimony. on an envelope, which he characterized as "sketches", and thereafter went to his office and rewrote his notes in a book which he produced and used on the witness stand. He testified that he could not give any testimony without referring to the notes in that book; that he could not from his independent recollection give any statement of any conversations, but would have to refer to his notes. He admitted that at his office he enlarged upon the notes originally made, added to what he there had, and destroyed his original notes. He nowhere testified that his notes were correct, or that the book which

he used contained an accurate statement of his recollection at the time he wrote it. He admitted that after Mrs. Curtis left the witness stand, and before he testified, he went into conference with her concerning his evidence and her evidence already given, in spite of the fact that by Court order he had been excluded from the courtroom while Mrs. Curtis was testifying. (Transcript, pp. 249-250.) He admitted that his testimony was given by reading from his notes, not his original notes it will be observed, but the book which he had prepared at a later time, and in answer to the Court's question, stated that he would have to look at his notes in order to testify (Transcript, p. 252). Objection was made to such use of his notes, but was overruled, as shown by the foregoing citations to the Transcript.

On cross-examination, he stated that the testimony on direct examination was given entirely from his notebook (Transcript, p. 266). He also stated that he had, at the direction of the District Attorney, given testimony only as to such things as he, the witness, considered applicable and material to the case at trial (Transcript, pp. 270-271), also that he had prepared a transcript of his notes for the District Attorney's use in this case, and that the notes used had been compared when the case was being prepared for trial (Transcript, p. 275).

As in the case of Mrs. Curtis, his examination started out with an ostensible refreshing of his memory from his notes (Transcript, p. 239), but, as pointed out, it developed that he had no independent recollection of

the matters, and, following the same procedure as Mrs. Curtis, partly read and partly translated his notebook to the jury. This is made plain by merely reading his testimony. As above stated, he nowhere claimed that the notes in any way refreshed his memory, nor did he vouch for the notes as an accurate and faithful memorandum of his past recollection made while such recollection was fairly fresh.

We submit that the witness should not have been allowed to use purported notes, written up at his leisure and not shown to have been correct and faithful when made. The same rules apply as in the case of Mrs. Curtis; the notes neither refreshed his memory, nor were the notes themselves properly guaranteed as correct by the witness. He also stated that he had selected and testified to what he considered as evidence in the case. If used at all, the notes should have been offered so that a proper objection to their admission could have been made. The witness, under no circumstances, should have been permitted to state in his own language, and as he chose, what he considered the notes meant, and to select what he chose from the material originally available to him.

3. *Assignments Nos. 36 and 37.* These assignments relate to the testimony of Paul Reynolds (Transcript, pp. 277-291). The witness testified that he listened at the door in the Curtis office and made notes of a few conversations which he claimed to have heard. He first stated that he put his notes down immediately after coming to his office and was now referring to them for the purpose of refreshing his memory. Upon

examination by the defense as to the competency of his notes, however, he admitted that he was not using the original notes made by him. He further stated that first he took some notes on a piece of paper while listening, then rewrote those notes on another piece of paper and later wrote his account in a book which he used on the witness stand. He admitted that he enlarged on his notes in rewriting them, although he claimed that he wrote down the exact conversations, or all of them that he could hear, at the time of hearing (Transcript, p. 283). He admitted that he had written more in the book used on the witness stand than he had in his original notes, or in the second copy of them, and that both the original notes and the second copy had been destroyed (Transcript, pp. 278-284). Objection was made to the use of his notes on the witness stand, and was overruled and an exception was noted. On cross-examination he stated that he "thought" he wrote down all that he remembered of what was said at the time he was listening. He finally admitted, however, that he did not have all of the conversations. (Transcript, p. 281.)

This witness' testimony is not so objectionable as that of the witness above discussed, but we submit that the witness nowhere qualified to use his notes; he nowhere stated that he did not have an independent recollection, and it is shown beyond dispute, from the authorities already cited, a witness must positively show that he has not an independent recollection.

Vicksburg Etc. Ry. Co. vs. O'Brien, *supra*.

Of course, until the witness denied any present recollection, and until he denied any refreshing of his memory by his notes, the question of admission of the memorandum itself would not arise.

We think the objection made to the use of his notes should have been sustained, at least until the witness was examined further as to whether or not he could testify independently of his notes. The witness did not testify to so much that there could be any presumption that he could not remember it independently. He was occupied in listening at the door on only two or three occasions, and those occasions were only a few weeks prior to the giving of his testimony.

We believe the Court erred, particularly in permitting the use of notes by this witness without any showing that he needed them.

As to the testimony of the three witnesses treated above, if the rules above stated from unquestioned authority are applicable to civil cases; if they apply in private litigation concerning mere private disputes between parties, certainly they should be applied with double force in a situation where men are placed on trial charged with serious crime. The rulings made by the Court in this case practically eliminated the defendants' right of cross examination by making such cross-examination a mere form, having neither substance nor meaning; and, if sustained, these rulings inject into the law of evidence in criminal cases the proposition that a witness designedly sent out in advance to gather evidence upon which a man may be convicted of crime, may prepare at his leisure narra-

tive statements composed of selected portions of conversations and incidents, and then sit comfortably on the witness stand, secure in the knowledge that he needs no qualification other than the ability to read what he himself has written.

The vice of such a procedure is well illustrated in this case by comparison of the testimony of the three witnesses above mentioned with that given by four other witnesses whose testimony followed immediately. Another prohibition agent was called to the stand (Transcript, pp. 291-296), one who had listened at the same door with the same ability to observe and hear what went on; his hearing was good (Transcript, p. 295), but who, contrary to the practice of the three witnesses preceding him, above discussed, produced his actual notes made immediately while the matters were more fresh in his memory than they would ever be again. Frankly he admitted that he could get only fragmentary portions of conversations. He told what he heard, and it meant practically nothing. It was as consistent with the theory of innocence, and even more so, than with the theory of guilt. He, likewise, was sent for the express purpose of gathering evidence against these defendants (Transcript, p. 296); but he neglected to spend his leisure time in writing up a book on the subject. Consequently his testimony was an exact reproduction of what he really heard, minus any enlargements added at a later date, and minus the feature of a narrative composed of "selected" portions.

Another witness, the Prohibition Director, testified (Transcript, pp. 297-300), that he was listening at the

same door on one occasion; that he could not hear much of anything, and substantially his testimony amounted to a statement that he saw, from a different vantage point opening into the hall of the building, certain persons moving about in the hall, among them some of the defendants.

The third, a special agent of the Department of Justice, testified that he listened at the same door giving into the Doctor's private office; that he heard a few fragmentary conversations, and no more. He was also unarmed by a previously prepared book. (Transcript, pp. 300-303.)

The fourth witness was a shorthand reporter, who qualified as competent to take down an ordinary conversation when she could hear it. She testified that she was at the door on one of the same occasions testified to by Mrs. Curtis, taking down in shorthand what she heard. She was also present at the door on other occasions. She had her notes taken in shorthand at the time (Transcript, p. 305). She was sent there for that express purpose (Transcript, p. 312). She had the same opportunity for hearing and observing as did Mrs. Curtis. She had infinitely superior ability for recording and retaining what she heard, yet (Transcript, pp. 307-311), that which she had was fragmentary, and the most of it so much so that it is impossible to read or understand it as expressing anything which can be defined or characterized. The most of it might fit into any conversation. Compared to this, we have the long, smooth and easily flowing narrative of Mrs. Curtis, which she represents to be "accurate" reproductions

of "selected" portions of conversations which she overheard and afterwards wrote into her book. We think a better demonstration of the impropriety of the procedure permitted by the Court could not be found, nor better proof of the danger inhering in permitting such testimony as that given by the witnesses Curtis and Kuchenbacher.

Another feature of Mrs. Curtis' examination appears from her cross-examination. In the course of that part of her testimony, omitting many matters about which the witness was not at all certain, she used the expression, actually or impliedly, "I don't remember", in the neighborhood of one hundred times. In each instance her answer related to a matter of importance. Her profession of acting as a witness was a mockery; the only purpose it served was that throughout the long hours during which she occupied the witness stand as a medium through which to present her written narrative to the jury, she naturally created the impression with the jury that they were listening to first hand testimony by a remarkably intelligent witness.

We most respectfully, but urgently, present that such a proceeding traverses both the rules of evidence and the spirit of the law which underlies them. No defendant can be fairly tried under such circumstances, and no defendant or his counsel could be expected to anticipate that any case against him would be presented to the jury in such a manner. The judgment ought to be reversed.

XV

Assignments Nos. 21, 22 and 23. By these assignments there is raised a question which is rather novel. The District Attorney produced before the jury (Transcript, pp. 115-128) an alleged detectaphone or detectograph apparatus; a witness was called to examine and identify the apparatus as such and to testify that the apparatus was placed in the Curtis rooms for the purpose of listening over it to conversations elsewhere. Later (Transcript, pp. 141-147), the witness Mrs. Curtis was called upon to testify that the transmitter of the apparatus connected by wires to the receiver, was placed in Dr. Goodfriend's office. After inquiring at great length about the apparatus, over objections of the defendants, the chief witness was permitted to exhibit the instrument before the jury and to explain it at length. After all of this demonstration and location of the apparatus, while the Court had under advisement an objection to any testimony concerning matters claimed to have been learned through it, based upon the ground that the placing of the transmitter in Dr. Goodfriend's office was a continuing trespass and a violation of his constitutional rights (Transcript, pp. 147-150), the District Attorney withdrew his offer in its entirety (Transcript, p. 182). In the meantime, however, the witness Curtis, and the District Attorney had frequently reminded the jury by indirection of the detectograph, and by inference had stated to the jury that evidence had been obtained over it also, in addition to what the witnesses claimed to have heard at the connecting door. This was done even to the extent

of directing witnesses to give, from their notes, only what they heard *at the door*, stating nothing which they heard over the detectograph. The suggestion that the witnesses could, if they might, tell a great deal more which was disclosed by the detectograph was too patent to be avoided, and must necessarily have led to a state of mind on the part of the jury extremely prejudicial to the plaintiffs in error. (Transcript, pp. 162, 181, 174, 177, 182, 248.) In the last instance just cited, the witness Kuchenbacher stated definitely that he had notes of conversations heard both at the door and over the detectograph.

Of course, the whole proceeding was a gradual encroachment upon the defendants' rights by stages so imperceptible that it would be hard to define them. But it is certain that the effect of the matters here complained of, in the aggregate, must have been highly prejudicial. As we have stated, there is no precedent in the matter so far as we know or have been able to learn; but we feel quite certain that the original objections to the testimony of Robin Reynolds (Transcript, pp. 116, 118, 127) ought to have been sustained. The Court should have guarded against precisely the prejudice resulting by requiring the Government to reorder its proof. The defense might then have submitted, at the outset, the objection which it was precluded from making until it was too late, that testimony based upon a trespass directed against Dr. Goodfriend's premises was inadmissible; which, if sustained, would have eliminated any demonstration before the jury or any explanation, and would have placed the matter in such

form that the subsequent reference to conversations heard over the detectograph would not have been made. Those references, made while the Court was reserving final decision on the objection last mentioned, recurred too systematically to be explained as accidents. It has long been recognized that when the same thing recurs at frequent intervals it ceases to become accidental and its existence is looked upon rather as a matter of design. But in any event, the injury was done the defendants; and under the Court's rulings, and in view of the order of proof which those rulings allowed, there was nothing the defendants could do about it but accept the situation.

We believe that these matters were prejudicial and prevented the defendants from having a fair trial, and that it should be held as error on the Court's part to permit such a display before the jury until the materiality, relevancy and competency of the proof, to which this was ostensibly a preliminary, had been determined.

See:

17 C. J., 326.

Boyd vs. U. S., 142 U. S. 450, 35 L. Ed. 1077.

CONCLUSION

Owing to the voluminous record in this case, we do not profess to have covered at all thoroughly all matters concerned in the assignments of error submitted, but we have endeavored within reasonable space to present to this Court the substantial features upon which we submit that the reversal of judgment herein should be ordered.

The outstanding features of the case, we believe, are that the search warrant proceeding directed against the Vernon Hotel, and the admission in evidence of the things seized and information there gained, was irregular and prejudicially erroneous; the purported testimony of the witnesses Curtis and Kuchenbacher was incompetent in the highest degree, and as we view the matter, around these outstanding errors were grouped a very considerable number of others which, as we have already indicated, had a cumulative prejudicial effect impossible of correction. We believe that either of the two principal matters suggested above are sufficient to require a reversal of the judgment, and we most earnestly submit that the interests of justice require that these plaintiffs in error, before they shall be required to pay a fine and suffer imprisonment, be tried anew under conditions different from those obtaining at the former trial. We submit that not only their interests, but the question of the use or abuse of our courts of justice are involved herein. We sincerely believe that the deliberate methods adopted by the principal witnesses for the Government to create a case upon which these defendants might be convicted were directed just as surely against the very bulwark of our liberties as against the persons who happened to be the subject of their endeavors.

We respectfully submit that these plaintiffs in error are entitled to a reversal of this judgment and to a new trial.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

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VESTER KINNEY, CARL H. SORENSEN
and ED. WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

The statement of the case as made by the plaintiffs in error is so little calculated to give this Court any light whatever as to the facts on which the rulings of the trial court, here complained of, were based, that we find it necessary at the outset to disregard practically in its entirety the statement of opposing counsel and to set out somewhat at length the actual facts and circumstances constituting the case.

The plaintiffs in error were indicted with five others.

One of these, Edith Sorensen, took to her bed during the trial and no verdict was returned as to her.

Another, J. H. Evans, was never arraigned but was called as a witness for the Government on the trial of the case.

Another, Ed. Hill, was dismissed from the indictment on motion of the Government before the case went to the jury.

Another, Henry Griffiths, Chief of Police of Boise, was acquitted by the jury.

Another, Ed Kemp, was convicted along with the plaintiffs in error but he did not appeal and entered immediately upon the service of his sentence.

The personnel of the plaintiffs in error is as follows:

H. Goodfriend was a well known physician of Boise, Idaho.

James D. Agnew was the sheriff of Ada County, Idaho, in which the City of Boise is located.

Sylvester Kinney was Sheriff Agnew's office deputy.

Carl H. Sorensen, together with Edith Sorensen, his wife, was, at the time of the indictment, operating a rooming house in Boise known as the Vernon Hotel.

Ed Ward was a taxicab driver who roomed at the Union Rooms in Boise.

The indictment was in six counts.

The first count charged a conspiracy as having been entered into in the City of Boise, Ada County, Idaho, on or about the 1st day of December, 1922, and continuing from that date to the 12th day of February, 1923, between the defendants named above and other persons to the Grand Jurors unknown, for the purpose of possessing moonshine whiskey for sale in violation of law.

The second count similarly charged a conspiracy to sell moonshine whiskey at wholesale and retail in violation of law.

The third count similarly charged a conspiracy to manufacture moonshine whiskey in violation of law.

The fourth count charged the defendants with unlawfully having in their possession a certain still and distilling apparatus and all necessary accessories set up and ready for operation without first having registered the same with the Collector of Internal Revenue for the District of Idaho in violation of Section 3258, R. S.

The fifth count charged the defendants with carrying on the business of a distillery without having given a bond and with intent to defraud the United States of the tax on the spirits distilled by them in violation of Section 3281 R. S.

The sixth count charged the defendants with making and fermenting in a building and on premises other than a distillery, duly authorized accord-

ing to law, certain mash, wort and wash fit for distillation and designed and intended for the production of spirits and alcohol in violation of Section 3282 R. S.

Dr. Goodfriend occupied as offices two rooms on the fifth floor of the Empire Building in Boise, Idaho. One of these rooms, referred to in the testimony as the inner or private office, was located in the southeast corner of the building. Dr. Goodfriend's other room immediately adjoined the inner office on the north. Immediately to the west of Dr. Goodfriend's inner office was a room used as an office by Guy Curtis and immediately to the west of this was another room used by Mr. Curtis and his wife as a private sleeping room. Between the office of Guy Curtis and the inner or private office of Dr. Goodfriend was a communicating door which Mr. Curtis kept locked on his side, but which Dr. Goodfriend did not lock on his side. (Tr. p. 128). There were two cracks in this door which permitted a person in the office of Mr. Curtis to see a considerable part of the space in Dr. Goodfriend's inner office. One of these cracks at the top of the door was almost half an inch wide for several inches and the other along the side of the door was probably three-eighths of an inch wide. Through these cracks it was possible to hear a conversation carried on in Dr. Goodfriend's office whenever this was in ordinary conversational tones. (Tr. pp 128, 129).

In the early part of December, Mrs. Curtis, while

in her husband's office adjoining the private office of Dr. Goodfriend, chanced to overhear a conversation concerning a still. Becoming interested in the conversation, she moved to the door and listened and then stood on a chair and found that by looking over the top of the door she could see the parties to the conversation. These she recognized as Dr. Goodfriend and a man whom she later identified as Ed Kemp, one of the convicted defendants. This conversation concerned the setting up of a still, the materials needed to operate it and ended in Goodfriend giving to Ed Kemp the sum of \$20.00 with which to purchase necessary materials for the operation of the still. (Tr. pp. 129, 130).

Shortly thereafter Mrs. Curtis heard a second conversation concerning the operation of this still and recognized the participants as Dr. Goodfriend and Sheriff Agnew. (Tr. p. 131). After discussing difficulties entailed in the operation of the still and the necessity for additional barrels, Dr. Goodfriend asked Sheriff Agnew if he could not help him in getting them, to which he said he thought he could. (Tr. p. 131). The conversation then drifted to a number of places that Dr. Goodfriend thought should be cleaned up and he told Sheriff Agnew that he wanted him to be the leader in this cleaning-up process and to get some of the credit for such activity. (Tr. p. 131).

Later in December, 1922, Mrs. Curtis overheard another conversation between Sheriff Agnew and

Dr. Goodfriend in which they discussed the profit so far realized and the amount to be expected if their venture could continue in successful operation. (Tr. p. 132).

About this time, Mrs. Curtis reported to the Federal Prohibition Office what she had overheard in Dr. Goodfriend's office and was instructed by Mr. McEvers, who was then, as now, an Assistant United States District Attorney, to take notes of such conversations as might be overheard touching this still and its operation. (Tr. pp. 133, 203, 217).

Following the receipt of information as to the matters which were transpiring at Dr. Goodfriend's office, the Government, through the office of the Federal Prohibition Director, and under advice of the district Attorney's office, took charge of the case which was developing and posted at various times witnesses in the office room of Mr. Curtis. In this way it was able to observe the formation, development and fruition of the conspiracy charged in the indictment. This is believed to be one of the comparatively few cases in which direct testimony has been available not only to show the existence of the conspiracy but the part the several members thereof were actually playing therein.

It is unnecessary to outline the evidence further than to state that it was sufficient to overwhelmingly establish the following facts:

1. That Dr. Goodfriend assumed the role of the acting and directing head of the conspiracy for the

manufacture, possession and sale of moonshine whiskey, and that the principal meeting place of the conspirators was in his inner office on the fifth floor of the Empire Building in Boise, Idaho;

2. That the conspirators set up and operated a large still on a place owned by J. H. Evans of Gooding, Idaho, outside the limits of Boise City and two or three miles from the center of the city. This place immediately adjoined a lot owned by Dr. Goodfriend and on which he resided. The Evans place was rented by Dr. Goodfriend and the still was operated by the convicted defendant, Ed Kemp, who is not one of the plaintiffs in error;

3. That the moonshine whiskey manufactured at the Evans place was sold and to be sold at the Vernon Hotel and at the Union Rooms in Boise and that Ed Ward, one of the plaintiffs in error, was to be active in the sale of this moonshine whiskey, not only at the Union Rooms, where he was supposed to keep a cache or supply on hand in a room registered under some fictitious name, but also to engage in certain wholesale operations and to establish what Dr. Goodfriend referred to as "a gallon route". (Tr. pp. 162, 163).

4. That Sheriff Agnew was supposed to have made arrangements with the Federal Prohibition officers, under which he would be informed of every application for a search warrant and, in effect, to be taken in on every contemplated raid by them. In this way, he would have advance information of

any contemplated raid on any place where moonshine whiskey made by the conspirators was kept and be able to tip them off prior to the actual raid. At the same time, he was to be active in the enforcement of the prohibition law insofar as other bootleggers were concerned, thus naturally increasing the profits of the enterprise in which he was personally interested. (Tr. p. 131).

5. That his office deputy, Kinney, one of the plaintiffs in error, was taken into the conspiracy by Sheriff Agnew on the theory that he would naturally be in position to obtain advance information on all contemplated raids. Sheriff Agnew took the precaution, on one occasion, when he was leaving town for a few days, to tell the federal prohibition people that if they wanted the aid of the office in obtaining any search warrants while he was out of town, not to go to his chief deputy, Robinson, but to go to Kinney, his office deputy. (Tr. p. 320).

Each of the plaintiffs in error was convicted on all six counts of the indictment. (Tr. pp. 49, 50). The defendant, H. Goodfriend, was sentenced to be confined in the United States penitentiary at McNeil Island, Washington, for a term of fifteen months and to pay a fine of \$2,000.00. The defendant, J. D. Agnew, was sentenced to be confined in the jail of Canyon County, Idaho, for a period of ten months and to pay a fine of \$1,000.00. Each of the remaining plaintiffs in error were sentenced

to be confined in the jail of Canyon County for a term of six months and to pay a fine of \$500.00.

As we understand the position of counsel for plaintiffs in error, they do not contend that the evidence was insufficient to sustain the verdict insofar as the conspiracy counts of the indictment are concerned, but merely question the sufficiency of the evidence to sustain the verdict as to the last three counts of the indictment.

BRIEF OF THE ARGUMENT.

“An application for a bill of particulars is addressed to the sound discretion of the trial court and is not subject to review.”

Knauer vs. United States, 237 Fed. 13, 14;

United States vs. Pierce, et al., 245 Fed.
889, 890;

United States vs. Youled, 253 Fed. 241.

“When there are several charges against any person or persons for the same act of transaction or two or more acts or transactions connected together, the whole may be joined in one indictment in separate counts and a motion to elect on which counts the Government will stand is properly refused.

McGregor vs. United States, 134 Fed. 194;

Pointer vs. United States, 151 U. S. 396,
38 L. Ed. 208;

Pierce vs. United States, 160 U. S. 355,
40 L. Ed. 454.

Sidebotham, et al., vs. United States, 253
Fed. 418.

“A motion to quash is one addressed to the discretion of the Court and a refusal to permit such motion will not be reviewed in an appellate court.”

McGregor vs. United States, 134 Fed. 192;

U. S. vs. Rosenberg, 7 Wall. 580, 19 L.
Ed. 263;

Durland vs. United States, 161 U. S. 306, 40
L. Ed. 709;

Andrews, et al., vs. United States, 224
Fed. 419;

Phillips vs. United States, 201 Fed. 262.

“The fact that defendants failed to register a still; that they failed to furnish a bond and that they fermented mash, wort and wash fit for distillation in a building other than a distillery, not duly authorized according to law may be proved by indirect evidence.”

McCurry, et al., vs. United States, 281
Fed. 532.

“Where a general judgment is imposed upon conviction on several counts and is not imposed under any single count nor in excess of what may have been given on any single count, the verdict and judgment will be upheld if the evidence was sufficient to sustain the conviction on any one count.”

Wetzel vs. United States, 233 Fed. 984.

“An affidavit taken before a Notary Public in connection with criminal prosecutions in Federal Courts cannot be considered by the Court as any evidence of the facts therein stated.”

United States vs. Schallinger Produce Company, 230 Fed. 293;

United States vs. Curtis, 107 U. S. 671, 673, 27, L. Ed. 534.

“Protection accorded by the Fourth Amendment against illegal search and seizure cannot be availed of by a co-defendant of the person whose premises were searched.”

Haywood vs. United States, 268 Fed. 803;

Lusco vs. United States, 287 Fed. 69.

Plaintiffs in error contend that the use of notes by a witness in the Federal Courts is limited to such use as may be necessary for the purpose of refreshing recollection. The record shows unmistakably that that was the only use of notes permitted by the trial court in this case.

ARGUMENT.

The first assignment of the plaintiffs in error is to the effect that the Court erred in denying the motion for a bill of particulars made and heard prior to the trial of said cause. Evidently they have little faith in this assignment for the reason that they have not argued it in their brief. It is, how-

ever, referred to in their statement of the case and it is there suggested that the denial of the bill of particulars in toto was an abuse of the discretion on the part of the trial court. It is familiar law, we think, that an application for a bill of particulars is addressed to the discretion of the trial court and that its action thereon is not subject to review.

Knauer vs. United States, 237 Fed. 13, 14;
United States vs. Pierce, et al., 245 Fed.
889, 890;

United States vs. Youled, 253 Fed. 241.

In considering the other assignment in this case, we shall, for convenience, follow as closely as possible the order of presentation adopted by counsel for plaintiffs in error. We therefore consider,

I.

ASSIGNMENTS 2 AND 3. These are directed to the Court's refusal to sustain a motion requiring the Government to elect between the conspiracy counts of the indictment and those based on the Internal Revenue laws and to the Court's refusal to permit a motion to quash the indictment. (Tr. pp. 52-54). Section 1690 U. S. Compiled Statutes (Section 1024, R. S.), reads as follows:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which

may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

It is too clear for argument that we have in the indictment under consideration several charges against the defendants for the same acts or transactions or for two or more acts or transactions connected together. The testimony necessary for the proof of the conspiracies charged in the indictment was competent and necessary for the proof of the violations of the Internal Revenue statutes charged in the last three counts of the information. Under these circumstances, there could, of course, be no question of the propriety of the joinder. The law on this point is well stated by the Circuit Court of Appeals of the Fourth Circuit in the case of *McGregor vs. United States*, 134 Fed., at page 194:

"The action of the Court below in refusing to require the United States to elect under which counts of the indictment the trial should proceed was without error. The offenses charged were, as has been shown, directly connected together, and it was quite apparent to the trial judge that any evidence offered to sustain one count was also admissible and relevant to the other counts of the indictment. Such motions are addressed to the discretion of the Court, and are not reviewable on writ of error. *Pointer vs. United States*. 151 U. S. 396, 38 L. Ed. 208; *Pierce vs. United States*, 160 U. S. 355, 40 L. Ed. 454."

The same doctrine was announced by this Court in *Sidebotham, et al., vs. United States*, 253 Fed., at page 418, where the Court used the following language:

“The scheme and device to defraud as charged in the indictment and the conspiracy to commit that offense, grew out of the same transaction, and were so connected together that the evidence to sustain one charge was evidence in support of the other charges, except to establish the conspiracy count, it was necessary to prove the conspiracy. Such charges may be joined under the provisions of Section No. 1024 of the Revised Statutes. (Comp. St. 1916, Sec. 1690).”

As to the action of the Court in refusing defendants' permission to withdraw their plea of guilty and to interpose a motion to quash the indictment it is sufficient to say that this matter was one entirely within the sound discretion of the Court and is not reviewable by an appellate court.

“It is well to note the fact that a motion to quash is one addressed to the discretion of the Court, and that in the courts of the United States, at least, the refusal to quash will not be reviewed in an appellate court.”

McGregor vs. United States, 134 Fed., at page 192.

Citing *United States vs. Rosenberg*, 7 Wall, 580, 19 L. Ed. 263; *Durland vs. United States*, 161 U.

S. 306, 40 L. Ed. 709, 10 Ency. P. and P. 567, and cases cited.

The same holding was made by this Court in the case of *Andrews, et al., vs. United States*, 224 Fed., at page 419. The same holding was also made by the Circuit Court of Appeals for the Eighth Circuit in the case of *Phillips vs. United States*, 201 Fed., at page 262.

In discussing these same assignments the plaintiffs in error contend that their conviction on the last three counts of the indictment was not sustained by the evidence; that is to say, it is contended that the Government offered no evidence tending to show that the defendants failed to register their still, that they failed to furnish a bond, and that there was no showing as to the legal status of the building in which the distilling was carried on. In answering this suggestion we content ourselves with referring to the case of *McCurry, et al., vs. U. S.*, 281 Fed. 532. That case was decided by this Court, and the very question here raised was passed upon in that case. At pages 533 and 534 the Court said:

“It is next assigned as error that the lower Court erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond. The Court instructed the jury that the prosecution need only prove the circumstances from which can be presumed lack of registry

and bond filed, whereupon the burden shifted to defendants to prove registration and filing of bond.

“A circumstance of great significance against the registration of the still and filing of a bond by the appellants was the fact that they made no claim of ownership, interest in, or knowledge of the still. This was in accordance with their plea of not guilty, and was a practical admission that they had not registered the still, nor given bond therefor. This fact was brought to the attention of the appellants by the Court in its decision denying the motion for a new trial, in response to which they remained silent. The absence from the case of any claim of ownership, intent, interest in, or knowledge of the still, on the part of the appellants, was a material circumstance, sufficient to shift the burden of proof, and justify the instruction of the Court to the jury that the burden was upon the defendants to prove the registration of the still and filing of bond. If the appellants had registered the still and filed the bond, they knew that fact better than any one else, and could have so stated at any time during the proceedings against them.”

In the case at bar the defendants all pleaded not guilty and all except the defendant Kemp denied any knowledge, whatever, of the installation of the still and its operation. They made no claim of ownership or interest in the still, and denied all knowledge of its location, its operation and the sale or disposal of its products. In view of these facts, the rule announced in the *McCurry* case just cited has full application.

But even though it should be held that the evidence was insufficient to sustain the conviction upon any one or all of the last three counts of the indictment, the sentence imposed by the Court cannot be disturbed if a conviction on any count of the indictment is upheld. The judgment was not apportioned to any count. It was general in its terms and applied to all the counts on which plaintiffs in error were convicted and it did not exceed that which might have been imposed upon conviction under any single count.

Wetzel vs. United States, 233 Fed., page 984.

II.

ASSIGNMENTS 48 AND 49. What has been said under sub-head I is sufficient to dispose of the argument under assignments 48 and 49, except that it should be added that as we read the decision in the case of U. S. vs. Stafoff, 67 L. Ed. 211, that case fails to hold, as contended by counsel for plaintiffs in error, that one cannot be convicted under both the National Prohibition Act and the Revenue laws for the same act. However that may be, it cannot be contended here that they were convicted under both Acts for one and the same offense. It is clear, however, that the acts established in evidence were sufficient to prove, beyond any reasonable doubt, the several conspiracies alleged, and also the vio-

lation of the Revenue Laws charged in the last three counts of the indictment.

III.

ASSIGNMENT No. 47. What has heretofore been said applies to this assignment, and need not be repeated.

IV.

ASSIGNMENTS Nos. 10, 11, 12, 13, 14 15. The next matter discussed in the brief of plaintiffs in error relates to certain alleged errors committed by the Court in admitting in evidence certain intoxicating liquor and other articles obtained by officers of the Government during a search of the rooms occupied by defendants, Carl Sorensen and Edith Sorensen in the Vernon Hotel. It was contended that this search was illegal and that the evidence should have been excluded. It will be recalled that Carl Sorensen and Edith Sorensen were the proprietors of the Vernon Hotel. A search of this hotel had been made under a search warrant, procured on an affidavit signed by Paul Reynolds, a prohibition agent. Based upon the evidence thus obtained, an information was filed against these defendants in the United States District Court for the District of Idaho, charging them with the possession of intoxicating liquor. A petition, verified by the defendants before a notary public, and supported by affidavits subscribed before a notary public, was

filed asking for the return of the seized property. An order to show cause was issued and served on the prohibition director. He appeared in obedience to the order and filed a demurrer to the petition and to the showing in support thereof. This demurrer was sustained by the trial court. When the two Sorensens were later indicted in this case, it was stipulated that the record concerning the petition and the proceedings had thereon should be made a part of the record in this cause. This stipulation was approved by the trial judge. (Tr. pp. 27-49).

Plaintiffs in error now contend that the trial court should have declared the search of the Sorensen premises illegal, and refused to permit the introduction of the evidence secured thereby. As previously stated, the trial court sustained the Government's demurrer to the petition. (Tr. pp. 47-49). It is true, as pointed out on page 21 of the brief of plaintiffs in error, that the trial court, in sustaining the Government's demurrer, did not expressly pass upon the contention of the Government that the showing made by the Sorensens for the return of the confiscated liquor and other property was insufficient, by reason of the fact that the affidavits of Carl and Edith Sorensen (Tr. p. 33), intended as a verification of the petition, was not made before an officer authorized to administer oaths in a judicial proceeding in a United States court. The same objection was raised to the sup-

porting affidavits (Tr. pp. 38-45), as these affidavits were subscribed and sworn to before a notary public. It was then, and is now, the position of the Government that the petition as verified, and the supporting affidavits could not be considered as offering any evidence, whatever, of the alleged facts therein recited. This question was distinctly passed upon by this Court in the case of *U. S. vs. Schallinger Produce Company*, 230 Fed. at page 293, where the Court, after referring to certain affidavits which were relied upon in that case, used the following language:

“The question therefore arises: Can these affidavits taken before notaries, be considered by the Court? I am of the opinion that they can not.”

The Court at this point quotes extensively from *U. S. vs. Curtis*, 107 U. S. 671, 673; 2 Sup. Ct. 507, 509; 27 L. Ed. 534, and then follows such quotation with this sentence:

“It follows from this decision that a notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions.

“This Court will, therefore, refuse to accept these documents taken before notaries as evidence, and the search can not, therefore, for want of any affirmative showing, be held to be illegal.”

The search warrant complained of was issued upon the affidavit of Paul Reynolds, set forth in

the complaint at pages 35 and 36. Much space is devoted in the brief of plaintiffs in error to arguing the insufficiency of this affidavit. The trial court passed over without question the contention that the affidavit was insufficient, and confined his discussion to the question of whether the rooms occupied by the Sorensens in the Vernon Hotel were used by them exclusively as their own private apartment and as their residence in such manner as to constitute the same a "private dwelling" within the meaning of the National Prohibition Act. Doubtless he assumed, as this Court will doubtless find, if such finding should be necessary, that the affidavit was in fact sufficient. But accepting the affidavits submitted in support of the petition for a return of the seized liquor at their face value, notwithstanding the fact that they had not been sworn to before an officer competent to administer oaths in connection with criminal prosecutions in the United States courts, the trial court was still of the opinion that the showing of fact was not sufficient, and the Government's demurrer was accordingly sustained. At the trial of this case when evidence was being elicited from the witness C. B. Steunenberg (Tr. p. 71), as to what had been found in the search of the rooms occupied by the Sorensens in the Vernon Hotel, objection was made by counsel for the Sorensens to the testimony, on the ground that it had been obtained through the use of an illegal search warrant. The Court thereupon

excused the jury, and after the jury had left the room the Court stated that he would hear the Sorensens on the matter of the admissibility of the evidence secured by the search. The Court said:

“I will hear the defendants Sorensen, if they desire to be heard in the way of sworn testimony as to the situation there. I will give them an opportunity to be heard now, and before passing upon the matter I shall require them to submit to interrogation by myself as to conditions there. In other words, I am not satisfied with the general statements as made in the application and the showing made in connection therewith, and desire that they submit to cross-examination, or, rather, to examination. Such testimony, however, not to be heary by the jury or used against them in this trial.” (Tr. pp. 74-75).

This invitation to furnish additional facts was refused by the Sorensens.

In view of the fact that this Court is now being asked to declare the search warrant illegal, we submit, as an elementary proposition, that this Court must pass upon that request in the light of all the information afforded by the record now before it, and not merely in the light of the information that was before the trial court. This information, discloses that the rooms used by the Sorensens in the Vernon Hotel were not used exclusively as a private residence but that they were used in part “for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house,” within the mean-

ing of Section 25 of the National Prohibition Act.

Mr. Steunenberg in describing the Vernon Hotel, testified that on the day of the search he found that there were double doors from the street to the stairway; that there was a small desk in the hallway upstairs, but that there was no office or anything to suggest an office, except the desk in the hallway. He testified that when the doors from the street to the stairway opened, a buzzer rang in Room 2, the buzzer ringing continuously while these doors were open. (Tr. p. 72). In a similar way witness O. K. Nickerson testified that when he first went into the Vernon Hotel he heard a buzzer ring, and immediately saw Mrs. Sorensen coming out of her room. (Tr. p. 82). Similarly, witness Paul Reynolds testified that he noticed a buzzer over the door in Mrs. Sorensen's room, on the inside. He noticed the buzzer ring when the door opened downstairs. (Tr. p. 85). This testimony clearly establishes as a fact in this case that the occupancy of the rooms by the Sorensens had a direct relation to the rooming house enterprise, and that they were connected with, and constituted a part of, such enterprise. Within the reasoning of the trial court, therefore, (Tr. p. 48), the Sorensens' rooms should be "treated as a part of the rooming house business, and not as held exclusively for residence purposes." (Tr. p. 48). The situation here presented, is, therefore, just what the trial court had in mind when he stated, (Tr. pp 48, 49), that while "courts

must carefully protect the home from unwarranted intrusion, * * * * there must be equal concern to see that the provisions of law authorizing searches for contraband liquor are not nullified by cunningly devised schemes by which bootlegging enterprises are given the similitude of private dwellings." Upon the showing thus made by the record now under consideration, the Sorensens' rooms were not used exclusively as dwelling apartments, and the contention that the search warrant was illegal has no foundation in fact.

Finally, it remains to be suggested that even though the search warrant may have been illegal as to the Sorensens, and a violation of their constitutional rights, the Government was, even so, entitled to have the evidence impounded for use against the other parties to the conspiracy whose constitutional rights could in no case have been violated by the search.

Haywood vs. U. S., 268 Fed. 803;

Certiorari denied, 256 U. S. 689.

The point just made, to-wit, that the protection guaranteed by the Fourth Amendment cannot be availed of by a co-defendant, was specifically upheld in the case of *Lusco vs. United States*, 287 Fed., page 69. The following is taken from the syllabus in that case:

"The protection accorded by the Fourth Amendment against illegal search and seiz-

ure cannot be availed of by a co-defendant of the person whose premises were searched."

The Court in the Lusco case cited as authority for this holding the case of Haywood vs. United States, *supra*.

V.

ASSIGNMENTS NOS. 24, 26, 32, 33, 34 and 42. Evidently the plaintiffs in error have but little faith in the assignments here discussed, since they say, on page 38 of their brief:

"These matters may be, and no doubt are, comparatively unimportant as compared with the more outstanding features of the case; but a continuous succession of error, as we believe these matters to be because of their lack of connection, will eventually overload any defendant in any criminal case."

Generally, the objections referred to relate to testimony given as to conversations overheard in Dr. Goodfriend's inner office, and, to a lesser extent, to testimony relating to matters on the outside which was offered for the purpose of connecting up the direct testimony as to the conspiracy; thus showing not only the existence of the conspiracy but its actual operation.

VI.

ASSIGNMENT No. 44. This assignment is to the effect that the Court erred in sustaining objections to the question of defendants put to the witness

Ernest A. Stoops as to whether he had received any order from Chief of Police Griffiths to protect any rooming houses in Boise, and in sustaining objections to similar questions as to whether the Chief of Police had given instructions not to enforce the liquor laws, etc. This assignment is clearly without merit insofar as this appeal is concerned. Defendant Griffith was acquitted by the jury, and this testimony, or offer of testimony, insofar as it had any value at all, related solely to the acquitted defendant. The exclusion of the testimony could have had no effect on the other defendants.

VII.

ASSIGNMENT No. 16. In this assignment objection is made to the fact that the Court permitted the witness McCutcheon, a deputy United States Marshal, to testify that he had served abatement papers on the Vernon Hotel on the 30th of January, 1923. This testimony had a direct relation to the proof of the conspiracy itself, for, following the service of the abatement papers, the government was able to prove, by the testimony of witnesses stationed in Mr. Curtis' office, its effect upon the other conspirators, as shown by what went on in Dr. Goodfriend's inner office. (Tr. pp. 191, 286). The evidence was not, therefore, immaterial or unimportant.

VIII.

ASSIGNMENT No. 43. This assignment is to the effect that the Court erred in permitting the plaintiff to cross-examine defendant Griffith concerning his knowledge of the reputation of defendant Goodfriend in the matter of gambling and playing cards. The witness Griffith had admitted going to Dr. Goodfriend's office on various occasions. On cross-examination this defendant was interrogated as to why, being the Chief of Police, he did not require Dr. Goodfriend to come to his office, rather than to go to Dr. Goodfriend's office at the latter's bidding. This question was followed by a question as to whether or not, in so going, he did not know that Dr. Goodfriend was a professional gambler. He stated that he knew he was playing cards, but never could catch him at it, and admitted that he had tried. (Tr. pp. 385 and 386). The interrogation was entirely proper, as showing the possibility of the Chief of Police being a member of the conspiracy which was then on trial.

IX.

ASSIGNMENT No. 17. In this assignment objection is made to the Government's placing in evidence the fact that two newspapers, bearing printed labels containing Dr. Goodfriend's name, were found by the searching officers at the house on the Evans grounds where the still was in operation. In view of the fact that these papers had evidently

been sent through the mails, and that Dr. Goodfriend had rented the place in question from Evans, the evidence was clearly admissible as an incident tending to show Dr. Goodfriend's connection with the conspiracy, and with the operation of the still.

X.

ASSIGNMENTS NOS. 5, 6, 7, 8, and 9. All of these assignments relate in one way or another to testimony concerning the sale of liquor at the Union Rooms. This testimony was directly connected with the defendant Ed Ward. Mrs. Curtis testified that on or about December 28th, while Carl Sorensen was in Dr. Goodfriend's office, Dr. Goodfriend asked: "Have you ever called up Ed to find out whether he wants anything or not?" Mr. Sorensen replied: "No, I haven't just recently, I will call up right now." He called up a number, 3141, asked if Ed was there, and said: "Do you want any of the stuff, Ed?" Witness did not hear the other part of the conversation, but Sorensen then remarked: "Well, you say you want one sack. I will deliver it Sunday morning about ten o'clock." (Tr. p. 132). The number 3141 was the telephone number of Mrs. Henrietta Goldsberry, at 709½ Main Street,—the Union Rooms. (Tr. p. 113). Again, the witness Curtis testified (Tr. p. 169), that Dr. Goodfriend called 3141 and asked for Ed, and told him to come down right away. She further testified that after he came Dr. Goodfriend

told him to put his cache in a room and register that room under a fictitious name; that he should always keep the room registered, and, if necessary, to change the cache three or four times a day, but wherever it was, to keep the room registered under a fictitious name. (Tr. p. 170). In view of this testimony, the sale of liquor at the Union Rooms, where Ed Ward was living, by Etta Goldsberry, one of the conspirators who was, at the time of the indictment, to the Grand Jurors unknown, was clearly competent and proper.

XI.

ASSIGNMENT No. 27. This deals with the refusal of the Court to permit the witness Marie Curtis to be cross-examined concerning the relations of her husband and herself with an organization known as the Ku Klux Klan. There was no reason, whatever, for bringing the Ku Klux Klan, or any other Klan, into the trial of this case, and the references to that organization were clearly made in an attempt to prejudice certain members of the jury. This assignment of error is unworthy of serious consideration.

XII.

ASSIGNMENTS Nos. 38, 39 and 40. These assignments refer to the Court's refusal to permit plaintiffs in error to inquire of the witness Paul Reynolds as to whether he had information concern-

ing sales of liquor in the Vernon Hotel other than that stated by him in the affidavit which he made for the procuring of a search warrant. The inquiry was obviously improper. It was in no sense cross-examination of the witness and this line of questioning was properly excluded by the Court.

XIII.

ASSIGNMENTS NOS. 18 and 45. The witness Paul Reynolds was asked if in procuring the search warrant for the search of the Evans' place where the still was found, he had correctly stated in his affidavit the information upon which he acted. Plaintiffs in error use something like a page of their brief in complaining of the fact that the Court did not allow the witness to answer this question, whereas, the record plainly shows that the question was answered.

Q. Did you correctly state in the affidavit you made at that time information which led you to make the search out there on the Evans' ranch?

A. Surely.

(Tr. top of page 100).

These assignments insofar as they are otherwise discussed in the brief of opposing counsel are clearly without merit.

XIV.

ASSIGNMENTS NOS. 25, 28, 29, 30, 31, 36, 37 and

41. It is clearly evident from the attention given to these assignments and the earnestness which characterizes the attempt to mislead this Court into thinking that they are of special merit, that these particular assignments are regarded by plaintiffs in error as the real heart of their case. It can be easily demonstrated, however, that they are without merit. These assignments relate to the use of notes, previously made, by the witness Marie Curtis for the purpose of refreshing her memory while giving her testimony. It will be recalled that she began taking notes on the 29th day of December, 1922, and continued to make notes of conversations as she heard them from that time through to about the 15th day of February, 1923. These notes covered many separate conversations held in Dr. Goodfriend's inner office between the Doctor and other conspirators. It was entirely obvious that without the use of these notes it would be humanly impossible to give the dates on which particular conversations occurred and to name the parties present. The witness testified that she made these notes within a few minutes after hearing the conversations and while they were still fresh in her memory.

Counsel for plaintiffs in error devote several pages of their brief to a discussion of the rules applicable to the use of notes made under circumstances similar to those which existed in this case. After much contending they conclude that the cor-

rect rule is that such notes or memoranda are admissible only for the purpose of refreshing the memory of the witness, and they entirely overlook the fact that the record discloses with unmistakable clearness that that was the only use which the Court at any time sanctioned or permitted. In other words, they overlook the fact that the record shows, beyond any question, that the rule contended for was applied with all the strictness that was humanly possible under the circumstances of the case. Moreover, it is clear that the prosecution never, at any time, attempted to make any other use of these notes than for the purpose of refreshing the memory of the witness.

When this matter first came up, (Tr. p. 133), after developing the fact that notes had been made, the prosecution asked this question:

Q. Now, referring to your notes *for the purpose of refreshing your memory*, I will ask you to give us what you heard on December 29th?

This matter is next taken up on page 137 of the transcript where the following occurs:

THE COURT: The notes, of course, are not offered, Mr. Cavaney. There is no offer of the notes.

MR. CAVANEY: Well, she started to read from them, Your Honor, please.

THE COURT: I didn't understand so. Counsel asked her to refer to them to refresh her recollection and she is to testify simply

from refreshing her recollection. *We will not permit her to read the notes, of course.*

The following occurs on page 138 of the transcript:

Q. (By MR. McEVERS): Now, looking at your notes, Mrs. Curtis, for the purpose of refreshing your memory, tell us in substance as near as you can what that conversation was. *Of course, we understand you can't read your notes, but you can refresh your memory.*

A. Yes.

Q. (By THE COURT): Madam, have you refreshed your memory of what occurred by reading your notes over the last few days?

A. Well, I have looked over them, but I have not studied them.

Q. Can't you now without looking at them give us in substance what occurred on this particular day?

A. I believe that I could not.

Q. Very well. *You may glance over them and give us the substance of what occurred.*

MR. McEVERS: If the Court please, may she read a part of them and then give us the substance and then read more, there are some of them quite long, and it will be quite difficult for her to read them all and then relate the conversation?

THE COURT: Yes, as you go from one subject to another you can give us the substance of what was said on that particular subject.

Q. (By MR. McEVERS): Refreshing your memory, will you tell us what was said there at that time?

We now quote from page 154 of the transcript where this question of the use of her notes was again brought up:

MR. MARTIN: Now, she is giving a statement of things which she says occurred during January, and she is simply reading, that is what we object to.

THE COURT: *I don't understand that she is simply reading them.*

MR. MARTIN: We can see her, Your Honor please. She simply reads like reading a book.

THE COURT: I think it is a proper use of memoranda made at the time. It is a very familiar practice to use memoranda of figures and dates and other matters.

MR. MARTIN: But these are not figures and dates, Your Honor. This is a narrative story that this witness has prepared and written out, and she is sitting here in the witness chair now reading it.

MR. HAWLEY: And not as an assistance for memory, but as a substitute for her recollection.

THE COURT: You may proceed.

MR. McEVERS: Go ahead.

MR. MARTIN: We would like an exception to the ruling of the Court permitting her to read her story.

THE COURT: *The Court is not permitting her to read her story. The record will show that.*

We quote from pages 157 and 158 of the record where the following colloquy occurred:

MR. SMEAD: Now, again, Your Honor, it is more than obvious that the witness is reading a narrative she has written at some time.

MR. McEVERS: She is entitled to refresh her memory from notes, and it is obvious that, running over a period of a month or so, it wouldn't be accurate if she didn't.

MR. SMEAD: She shouldn't read what she wrote.

THE COURT: I think I will permit her to proceed. Counsel are familiar with the necessity of producing, for instance, a short hand reporter, he is permitted to read his transcript generally. Strictly speaking, he can only refresh his memory from it. We all know that he must practically read what he wrote at that time.

On page 161 of the transcript, Mr. Smead ended a long dissertation on the use of notes by a witness with the following remark:

“But all she can do is to read what she wrote about her own impressions.”

Whereupon the Court remarked:

THE COURT: *She isn't doing that.* She is being permitted to look at this book just as one is often permitted to use a diary, sometimes that is written up at the end of a day, perhaps not until the day after.

As shown on the same page of the transcript, the Court just immediately thereafter instructed the witness as follows:

THE COURT: *Just glance over the subject matter, and then as far as you can, give in your own language what occurred when your memory is refreshed as to the particular subject.*

On page 178 of the transcript, the following occurs:

Q. (By MR. McEVERS): Well, alright, read your notes.

This standing by itself might be somewhat misleading but in view of the limitations placed by the Court upon the use of the notes by the witness, it is entirely clear that the assistant prosecuting attorney at this point was merely suggesting to the witness that she read or glance over her notes for the purpose of refreshing her recollection. That is to say, for the purpose of making such use of her notes only as was permitted by the Court.

It thus appears in no unmistakable terms that the Court as his final direction and his final ruling on the question of the use of these notes instructed the witness as follows:

“Just glance over the subject matter, and then as far as you can, give in your own language what occurred when your memory is refreshed as to the particular subject.”

In view of the fact that the record thus shows in the most positive way that the only use made of the notes was such use as plaintiffs in error are here contending for, it is idle to argue this matter

on the theory that any other use was in fact permitted. We are assuming that the record which plaintiffs in error have brought here, and which they thus vouch for as correct, cannot be impeached by arguments of counsel or even positive assertions contrary to what the record itself shows.

ASSIGNMENTS NOS. 30 and 31. These assignments, with reference to the testimony of witness Kuchenbecker, have to do with the same subject matter just discussed with reference to the witness Marie Curtis, that is to say, with reference to the use of notes made by the witness at the time or shortly after he heard certain conversations to which he was permitted to testify. On page 239 of the transcript, after the fact was developed that he had made notes at the time of hearing the conversations or shortly thereafter, the following question was put to the witness:

Q. *All right, now, using those notes for the purpose of refreshing your memory, from them, Mr. Kuchenbecker, you may give the substance of the conversation between Dr. Goodfriend and Chief Griffith as you heard it.*

On page 252 of the transcript, the following occurs:

Q. (By MR. GIBSON): Pardon me, Mr. Kuchenbecker. You are reading from your notes, aren't you?

A. Just partly, yes.

Q. Well, you are reading what you are testifying to, you are reading, that is, you are reading all you are testifying to now from your notes, aren't you?

A. Yes, mostly. I—

THE COURT: *Just refresh your memory, Mr. Kuchenbecker. Can't you tell us a little more in narrative form just what happened?*

A. Not and be absolutely sure. I would have to look the notes over in order to—

Q. *Glance over them so as to get the subject matter and then give us the substance of it, what occurred.*

From the foregoing it appears clear that the only use which Mr. Kuchenbecker, as a witness, was permitted to make of his notes was limited by the Court, as in the case of Mrs. Curtis, to such use as was necessary for the purpose of refreshing his memory so that he could testify to the particular conversations which he heard on a particular date. It follows that this testimony was likewise admitted under the very rule for which plaintiffs in error here contend.

ASSIGNMENTS NOS. 36 and 37. These pertain in a similar way to the use of notes made by the witness Paul Reynolds while overhearing conversations between the conspirators or very shortly thereafter. On page 278 of the record, the witness stated:

“I am referring to my notes for the purpose of refreshing my memory.”

and the record as given on the following pages 278 to 283 clearly shows that the notes as made by the witness recorded his best recollection, immediately after hearing the conversation, of what occurred therein and were entirely competent for use by him for the only purpose permitted by the Court—the purpose of refreshing his recollection.

Concerning the testimony given by the witnesses Curtis, Kuckenbecker and Reynolds, and particularly with reference to the testimony of Mrs. Curtis, counsel for plaintiffs in error make much complaint over the fact that they only made notes of conversations concerning the subject matter of the conspiracies charged in the indictment, that is, concerning the operations of the conspirators in the making, possession and sale of the moonshine whiskey. As indicated by Mrs. Curtis, (Tr. p. 135), she did not think it necessary or proper to make notes of conversations which she may have heard between Dr. Goodfriend and patients who came into his office. When she ascertained that such conversations were going on she paid no attention to them and only made an effort to record the conversations when they had to do with the subject matter on which she had been requested by the Government to procure evidence.

Counsel say that it is very apparent that she made her notes with the distinct object of being able to convict the defendants. The exact contrary is apparent. Two of the defendants indicted by

the grand jury were Henry Griffiths, Chief of Police of Boise, and Ed Hill, a member of the detective force. It will be recalled that the testimony as to Hill merely disclosed that he had been in Dr. Goodfriend's office and that Dr. Goodfriend had done most of the talking and that Mr. Hill made no reply whatever which would indicate his acquiescence in what Dr. Goodfriend was saying to him. (Tr. p 187). In a similar manner, Mrs. Curtis recorded faithfully the conversation between Dr. Goodfriend and Chief of Police Griffith. Largely, these conversations had to do with matters other than the manufacture and sale of liquor as charged in the indictment. Upon the whole case the Government felt justified at the close of the evidence in dismissing the indictment as to the defendant Hill, and the Chief of Police was the one defendant acquitted by the jury. It is entirely obvious that if Mrs. Curtis had been merely attempting to make a sensational case, she would have been just as anxious to convict these city officers as she could be to convict the county officials and those associated with them. It is apparent, therefore, that if there had been such a desire to convict any one other than on the most truthful testimony, the addition of just a few words with reference to Hill and Griffith would have been sufficient to secure the conviction of both by the jury.

The testimony as given by the witnesses who overheard conversations in Dr. Goodfriend's office

was checked up on the outside in a great many details, as is shown by the record, and the checks always showed that the testimony as given by the witnesses was absolutely correct.

The record cannot be read without the conclusion that the testimony produced on behalf of the Government, while full and convincing, was conservatively correct in every particular.

XV.

ASSIGNMENTS NOS. 21, 22 and 23. These relate to the use of a detectaphone which the prohibition officials had placed in the office of Dr. Goodfriend. As a preliminary to introducing the evidence secured by the use of this detectaphone, the instrument was brought into court and set up so as to illustrate the use that had been made of it and to demonstrate that it was possible by such use to hear what was going on in the room where the receiving part of the instrument had been placed. Upon strenuous objection by plaintiffs in error to the use of this detectaphone, and owing to the fact that no precedent was available which permitted the use of evidence secured in this manner in a Federal Court, it was decided by the prosecution to withdraw the offer of such testimony in order that no risk might be run of invalidating the Government's case by the introduction of testimony which this Court or the Supreme Court might possibly hold had been improperly secured. The offer

to introduce such testimony and the preliminary preparations for the introduction of such testimony were, of course, made in good faith and the plaintiffs in error are in no position to complain because of the fact that the Government refrained from introducing the testimony procured by use of the dictaphone any more than they would be if the Court had merely sustained permanently their objection to such use as he did temporarily just before the offer of such testimony was withdrawn.

Upon the whole case we submit that the judgment of the trial court should be affirmed in toto.

Respectfully submitted,

E. G. DAVIS,

United States Dist. Atty.

JOHN H. McEVERS,

Assistant U. S. Dist. Atty.

*Attorneys for Defendants
in Error.*

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVES-
TER KINNEY, CARL H. SORENSON and ED
WARD,

Plaintiffs in Error.

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Southern Division*

HAWLEY & HAWLEY,
J. R. SMEAD,

Attorneys for Plaintiff in Error.

CLAUDE W. GIBSON,
WILLIAM HEALY,

Of Counsel for Plaintiffs in Error.

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WARD,

Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Southern Division*

The plaintiffs in error above named now petition the above entitled court for a rehearing of the proceedings heretofore had upon writ of error from the trial court. Briefly stated, the grounds upon which such rehearing is sought are as follows:

I.

That the record shows that the validity of the search warrant for the Vernon Hotel and the claims

of illegality of the procedure had under such search warrant, were before this court in all the particulars covered by the brief of the plaintiffs in error. The petition originally before the trial court set out all claims of such invalidity and illegality. (Trans. pp. 28-36). That petition was heard on demurrer only. (Trans. p. 46.) The opinion of the trial court related to the demurrer only. (Trans. pp. 47-49.) When the matter was first opened up at the trial the objection was made with a reference to the petition and affidavits accompanying it, that the search was of a dwelling place and was an unlawful search and seizure. (Trans. p. 71.) When it was objected further that the matter had been closed and submitted to the court on that petition the court ruled otherwise, holding that the inquiry under that petition was not closed. (Trans. p. 74.) When the court excused the jury in order to hear further objections and arguments on the questions the whole matter was submitted to the court on the objections stated in the petition. (Trans. p. 75.) Eventually the objection to which the opinion of this court refers was merely added to the objections already made. (Trans. p. 78.) A little later (Trans. p. 81,) a further specific objection was made that the search warrant was illegal *as shown by the record* in this case, and further that a search was made thereunder of a private dwelling house without having any search warrant for such a place.

It must appear very clearly from the citations given, that all of the objections urged in our brief were before the trial court. If so, we respectfully submit that all of those made should be passed upon by this court. And we firmly believe that in so doing, this court will find it necessary to declare the search illegal and the admission of evidence so obtained erroneous, because of the insufficiency of the affidavit by which the warrant was procured, as well as because of the fact that premises were searched which were not contemplated either by the warrant or affidavit, to-wit, a private dwelling place.

And if these points be established we submit that the objection was good not only as to plaintiff in error Sorenson, but also as to all the defendants and the error entitled to all a reversal and a new trial. And the citations in the brief for the Government, claimed to show that only the defendant whose property was unlawfully seized may have the benefit of the objections made in this case, do not so hold.

Haywood et al vs. United States 268 Fed. 803 holds, not what the Government contends herein, but that the property in question was not the property of any defendant, but was the property of an association known as the I. W. W., which was not on trial and for whose acts the defendants were not charged, and that therefore the usual rule should apply that unless the defendant's property rights had been violated, they could not object nor would the court stop to

inquire how the government obtained the property of someone not on trial. This is a familiar rule but has no application to the instant case. It is unquestionable that the property seized belonged to a defendant. It is also beyond question that the ownership and possession of that property was in this case charged, not only against that defendant, but also against every other defendant in the case. The charge being conspiracy, all defendants, so to speak, stood in the shoes of the one whose property rights had been violated. It would indeed be a strange rule which holds one accountable for an act of ownership and possession of property, even to the extent of charging it against him as an overt act in the indictment, on the theory that he is responsible personally for that which was done or possessed by another defendant, but which rule would not allow him the benefit of the same objections open to the person on account of whose acts such other defendant was to be held personally responsible. Which is to say, that rights and liabilities should certainly be reciprocal. If a defendant is to be placed in another man's shoes for one purpose, he should certainly be permitted to occupy those shoes for all purposes, including the related purpose of submitting objections to unlawful and unconstitutional procedure.

The case of *Lusco vs. United States*, 287 Fed. 69, did not involve any possible question which is before the court here. Lusco was tried on his own merits,

and had no possible right to object that the Government had seized some property belonging to another man who was not on trial. Any statement in that opinion based on any other theory is pure dictum. There is no authority to be cited from any source which contradicts the position which we have taken here.

II

We failed to make plain to the court our position concerning the necessity of an election by the prosecutor between the counts in the indictment depending on the National Prohibition Act for the criminality alleged, and other counts depending on the revenue laws. The Act of Congress, *42 Stat 222, 233*, supplementing the National Prohibition Law, states definitely that where the *same act* is a violation of the Internal Revenue Law and also of the National Prohibition Act, the defendant *can not be prosecuted under both*.

The joinder in one indictment does not remedy the matter, and precisely because of such joinder the prosecutor should be required to elect which set of counts he will stand on. Only by so doing can he avoid the double prosecution which the Act of Congress forbids in very plain language. These defendants were doubly prosecuted for a course of action alleged to violate both the National Prohibition Act and the Internal Revenue Laws. This was plainly contrary to both the letter and spirit of the Act of

Congress above referred to. As shown in our brief, election was asked both at the beginning of the trial and at its close. And we submit that it did not help the matter to frame one set of charges as conspiracy rather than direct charges of violating the National Prohibition Act. The only criminality in the conspiracy charges must have arisen from the terms of the National Prohibition Act. Except for it, the agreements charged in the conspiracy counts were perfectly lawful, and the principal overt acts charged were themselves violations of the National Prohibition Act, if true. And so these men were tried under a state of facts which was gauged and measured by the National Prohibition Act and the Internal Revenue Laws at one and the same time, and were convicted on both sets of charges. We submit that this was plainly erroneous.

CONCLUSION

In conclusion, we call the court's attention to its opinion wherein it holds as to the search warrant proceedings that the inquiry into such proceedings was *properly continued during the trial*. This being true, *the petition itself was before the court for that purpose* and it certainly presents all objections which are covered in our brief on file in this court. Therefore, those assignments of error should be passed on by this court.

And as to the misjoinder of the charges in the in-

dictment, this Court's opinion heretofore filed is based on the proposition that the different counts of the indictment all related to the same act. This is exactly our position at this time. Because of that fact the misjoinder was erroneous and the defendants were doubly convicted for the same act contrary to the provision of the statute herein referred to.

We submit that these matters are such as to justify a reconsideration of this matter, and a reversal of the judgment for the purpose of granting a new trial.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.

As one of the counsel for plaintiffs in error herein, I hereby certify that in my judgment the foregoing petition for a rehearing is well founded in the particulars set out and that it is not interposed for the purpose of delay.



Counsel for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

THOMAS CARSTENS and STACIE C. CAR-
STENS, His Wife,

Appellants,

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of
PATTERSON-MacDONALD SHIPBUILD-
ING COMPANY, a Corporation, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

FILED

AUG 16 1923

U. S. DISTRICT COURT

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion, Bankrupt.

THOMAS CARSTENS and STACIE C. CAR-
STENS, His Wife,

Appellants,

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of
PATTERSON-MacDONALD SHIPBUILD-
ING COMPANY, a Corporation, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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WM. Z. KERR, Attorney for Appellant, 1309 Hoge Building, Seattle, Washington.

Messrs. BRONSON, ROBINSON & JONES, Attorneys for Appellee, 614 Colman Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

**Petition of Thomas Carstens and Stacie C. Carstens,
His Wife.**

To C. R. Hawkins, Referee in Bankruptcy:

The petition of Thomas Carstens and Stacie C. Carstens, his wife, respectfully shows as follows:

I.

That on November 1, 1917, Thomas Carstens and Stacie C. Carstens, his wife, were the owners of property situated in King County, Washington,

*Page-number appearing at foot of page of original certified Transcript of Record.

described as follows: All of Government Lots 3, 4 and 5, according to the official map of the Duwamish Commercial Waterway, situated on the east bank of and fronting on Duwamish Waterway and Turning Basin No. 1, which are west of East Marginal Way, containing approximately twenty-five acres. That on the said date Thomas Carstens and Stacie C. Carstens, his wife, and Patterson MacDonald Shipbuilding Co. executed a written lease providing that the said owners let the said property for a term of five years from June 1, 1917, at an annual rental of \$5,000 payable monthly in advance on the first day of each and every month during said term, and in addition to the said rental, the said lessee agreed to pay the annual taxes on the said property commencing with those falling due after the date of the said lease. That the said lease, in addition to the said covenant to pay rent, provided that if default should be made in any of the covenants of the lease or breach thereof, then the lessor might re-enter the [2] premises; and said lease also provided that the lessee should not let or underlet the whole or any part of the premises without the written consent of the lessors, nor assign the said lease, nor any part thereof without written consent, nor "shall the interest of the lessee be transferred by any operation of law through any execution, sale or bankruptcy proceeding."

II.

That the Patterson MacDonald Shipbuilding Co. entered into possession of the said premises under the said lease and paid the rent stipulated therein

up to and including the month of March, 1920, at which time the said Shipbuilding Company was adjudged a bankrupt in the above entitled court. That thereafter J. L. McLean was elected and qualified as Trustee and continued in possession of the said premises until July 1, 1921; that during his possession as Trustee, the Trustee paid the cash rental stipulated in the lease and by mutual agreement between the Trustee and the owners of the property, surrendered and delivered possession of the premises to the owners on July 1, 1921. That at the time of the surrender of the said premises the question arose as to what portion of the taxes required to be paid by the bankrupt should be paid by the Trustee; that the Trustee and the petitioners were unable to agree as to what portion of the said taxes should be paid by the said Trustee, the petitioners claiming that the taxes for the year 1919, all of 1920 and six-twelfths of the 1921 taxes should be paid by the Trustee, and the Trustee claiming that only that portion of the 1920 taxes and six-twelfths of the 1921 taxes which exclude the assessment for Commercial Waterway should be paid.

III.

That the taxes against a portion of Lot 3 covered by the lease for 1919 amount to \$308.63, of which \$113.53 is assessment for Commercial Waterway No. 1; that the taxes for 1920 on the said [3] tract amount to \$746.71, of which \$416.51 is assessment for Commercial Waterway No. 1; that six-twelfths of the 1921 taxes amount to \$147.11, of

which \$56.14 is assessment for Commercial Waterway No. 1.

That the taxes against a portion of Lot 4 covered by said lease for 1919 amount to \$7,619.69, of which the assessment for Commercial Waterway No. 1 amounts to \$1,271.20; that the taxes for 1920 amounts to \$10,778.99, of which the assessment for Commercial Waterway No. 1 amounts to \$4,106.01; that the taxes for 6/12s of 1921 amount to \$4,013.51, of which the assessment for Commercial Waterway No. 1 amounts to \$1,103.83.

That the taxes on Lot 5 covered by the lease for 1919, amount to \$230.01, of which \$204.75 is assessment for Commercial Waterway No. 1; that the taxes for 1920 on said lot amount to \$742.80, of which \$716.62 is assessment for Commercial Waterway No. 1; that the taxes for six-twelfths of 1921 on Lot 5 amount to \$195.83, of which \$184.28 is assessment for Commercial Waterway No. 1.

IV.

That prior to November 1, 1917, the date of the execution of the said lease, Commercial Waterway District No. 1 had been established and the maximum assessments determined and the maximum benefits to the said property adjusted; that at said time said assessment had been certified by the Commissioners of the said district to the County Assessor and the annual assessments were thereafter spread upon the tax records of King County, Washington, pursuant to Remington's Code, section 8192-a and the said assessments were included in

the general taxes and were deemed, for all purposes, a part of the general or annual taxes.

V.

That the petitioners were led to believe, and did believe, [4] from the conduct of the Trustee in continuing in possession of the said premises and the payment of the monthly rental stipulated in the lease, that the Trustee had accepted the said lease and treated the same as an asset of the bankrupt estate and for that reason filed no formal claim for the failure of the bankrupt to pay the taxes for 1919 that were payable at the date of adjudication in bankruptcy; that the assets of the bankrupt consisted of heavy machinery and equipment on the said premises that could only be moved at a large expense and could not be disposed of in a short period of time; that it was advantageous to the estate to have the Trustee continue in possession of the said premises under the said lease; that, believing that the said Trustee was remaining in possession under said lease and had accepted the said lease as an asset of said estate, the petitioners waived their right to cancel the lease for breach of the covenant in the lease for assignment by bankruptcy and waived their right to insist upon rent for the full balance of the term, that is, rent up to June 1, 1922, and accepted surrender of the premises on July 1, 1921; that more than a reasonable time elapsed after adjudication of bankruptcy and the appointment of the said Trustee in bankruptcy and the said Trustee remained in possession of the premises on the terms stipulated in the said lease,

thereby accepting said lease as an asset of the said estate.

WHEREFORE, Petitioners pray that an order be made declaring that the said lease be accepted as an asset of the estate of the bankrupt and that the Trustee pay from the funds in his hands to the King County treasurer or to the petitioners the taxes for 1919, 1920 and six-twelfths of the taxes for 1921, with interest thereon to the date of payment at the rate required by the laws of the State of Washington, and for such other and further relief as may be meet and equitable.

KERR, McCORD & IVEY,
Attorneys for Petitioners. [5]

United States of
America,
Western District of
Washington,—ss

Thomas Carstens, being first duly sworn deposes and says: That he has read the foregoing petition, knows the contents thereof and that the allegations and facts therein contained are true to the best of his knowledge and belief.

THOS. CARSTENS.

Subscribed and sworn to before me this 28 day of July, 1922.

[Notary Seal] O. F. KUHL,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Copy of within received and due service of same acknowledged this second day of August, 1922.

BRONSON, ROBINSON & JONES,

Attorneys for Trustee.

[Endorsed]: Filed this 2 day of Oct. 1922 at 10 o'clock A. M. C. R. Hawkins, Referee. [6]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON—MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

**Answer of Trustee to Petition of Thomas Carstens,
et ux.**

The trustee, for answer to the petition of Thomas Carstens and wife, respectfully shows as follows:

I.

Referring to paragraph IV, denies that the Duwamish Waterway assessments were or are a part of the general or annual taxes to be paid by the lessee under the lease referred to in said petition.

II.

Referring to paragraph V, denies that the trustee ever accepted the said lease as an asset of the bankrupt estate, and alleges that he merely continued to occupy the same during a period reasonably

necessary and convenient for disposing of and removing the property of the bankrupt from said premises, and that his occupancy was without objection on the part of the lessors, and was permitted by them at will without reference to the terms of said lease; that said lease was not at the time of bankruptcy or thereafter, an asset of value to the estate of the bankrupt, as the rental reserved therein greatly exceeded the reasonable rental value of said premises; that during the period of occupancy by your trustee, the lessors were unable to rent said property to any other tenant, and that they never at any time indicated any desire that the trustee hasten the removal of the bankrupt's property therefrom, or claimed that his continued possession thereof was unreasonable for the management and disposal [7] of the bankrupt's property located on said premises; your trustee further denies that petitioners waived any right to cancel said lease or otherwise by reason of his remaining in possession of said premises.

III.

That he continued to occupy the premises covered by said lease from the time of his appointment until the first day of July, 1921; that such continued possession was agreeable to and acquiesced in by the lessors, and was reasonably necessary for the management and disposal of the assets of the bankrupt located on said premises; that your trustee has never adopted or accepted said lease as an asset of the estate of the bankrupt; that it was not scheduled or inventoried as an asset, nor ap-

praised, and was and is in fact not an asset or an advantage to the estate, but a burden to it; that at all times since the bankruptcy the rental value of said premises has been much lower than the rent reserved in the lease; that the petitioners are entitled to a fair and reasonable rental for said premises from April 1st, 1920, to and including June 30, 1921.

BRONSON, ROBINSON & JONES,
Attorneys for Trustee.

State of Washington,
County of King,—ss.

H. B. Jones, being first duly sworn, on oath deposes and says: that he is one of the attorneys above named for J. L. McLean, trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt above named; that he makes this verification for and on behalf of said trustee for the reason that he is not within the State of Washington at present; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

H. B. JONES.

Subscribed and sworn to before me this 16th day of August, 1922.

[Notary Seal] IRA L. BRONSON,
Notary Public in and for the State of Washington,
Residing at Seattle. [8]

[Endorsed]: Filed this 2 day of Oct., 1922, at 10 o'clock A. M. C. R. Hawkins, Referee. [9]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY,
Bankrupt.

Reply.

To C. R. Hawkins, Referee in Bankruptcy:

The petitioners, Thomas Carstens and Stacie C. Carstens, his wife, respectfully replying to the answer of the Trustee, allege as follows:

I.

In reply to paragraph II, deny that the occupancy of the Trustee was for merely a reasonable period, and allege that they did not object to the occupancy because they were led to believe that the occupancy was with reference to and under the terms of the lease; deny that the rental reserved in the lease exceeded the reasonable rental value of the premises; deny that they were unable to lease the said property to any other tenant.

II.

In reply to Paragraph III, deny that it was necessary for the Trustee to remain in possession of the premises up to July 1, 1921, but admit that they acquiesced in the Trustee remaining in possession up to the said date, believing that the Trustee had accepted the said lease as an asset of the estate; deny that said lease is a burden to the estate; deny

that the rental value of the premises has been or is lower than the rental reserved in the lease.

For a further reply, petitioners allege that on August 28, 1920, within a year from the adjudication in bankruptcy, the petitioners, through their agent, Carstens Packing Company, and O. F. Kuhl, secretary-treasurer of the said corporation and auditor in charge of the petitioners' accounts, filed with the Trustee informal claim for taxes accrued under the terms of the lease at the time of [10] bankruptcy of the bankrupt; that a copy of the said letter is hereto attached, marked Exhibit "A" and made a part hereof by reference; that the Trustee made no objection to the said demand, and petitioners, relying upon said demand, and the continuation of the Trustee in possession of said premium, believed that the Trustee had accepted the said lease as an asset of the estate.

WHEREFORE, your petitioners pray that an order be made declaring the said lease to be accepted as an asset in the estate of the bankrupt, and that the Trustee make the payments from funds in his hands, as prayed for in the original petition herein; or in the alternative, if the Court denies the relief requested by these petitioners in whole or in part, and if the Court refuses to require the Trustee to pay the 1919 taxes which accrued prior to the time when the Trustee entered into possession of the premises, then that an order be made permitting the petitioners to file an amended claim to the letter of their agent above referred to, and for such

other and further relief as may be meet and equitable.

KERR, McCORD & IVEY.

United States of America,
Western District of Washington,—ss.

Thomas Carstens, being first duly sworn, on oath deposes and says: That he is one of the petitioners named in the above petition, and makes this verification for and on behalf of himself and his co-petitioner; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

THOMAS CARSTENS.

Subscribed and sworn to before me this 21st day of August, 1922.

RALPH WOODS,
Notary Public in and for the State of Washington,
Residing at Tacoma. [11]

Exhibit "A."

Aug. 28, 1920.

Mr. J. L. McLean, Trustee,
Patterson-MacDonald Shipbuilding Co.,
Seattle, Wash.

Ref: Thos. Carstens' Lease.

Dear Sir:

We had occasion to enquire relative to the real estate taxes for the year 1919, and find that the King County Treasurer's record show that these taxes have not been taken care of by the Patterson-

MacDonald Shipbuilding Company for any portion of the 1919 taxes.

We find that the taxes on part of Government Lot 4, West of East Marginal Way amount to \$7,619.69. The taxes on portion of Government Lot 3, West of East Marginal Way, amounts to \$308.63.

As one-half of the above amounts was not paid previous to May 31st, the full amount is now drawing interest at 12% per annum, which at the present writing would add about 3% to the amount of taxes.

The treasurer's records show that tax statements were sent to Patterson-MacDonald Shipbuilding Company, as they have done in former years, and no doubt they were received. However, we secured new statements and are forwarding these herewith for your prompt attention.

We trust that you will advise us within the next few days that these taxes have been taken care of, as we cannot permit this matter to go delinquent any longer.

Yours very truly,

CARSTENS PACKING COMPANY.

By O. F. Kuhl,

OFK:ES

Sec'y-Treas. [12]

Copy of within received and due service of same acknowledged this 22 day of Aug., 1922.

BRONSON, ROBINSON & JONES,

Attorneys for Trustee.

[Indorsed]: Filed this 2 day of Oct. 1922, at 10 o'clock A. M. C. R. Hawkins, Referee. [13]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

Order Upon Petition of Thomas Carstens and Wife.

Thomas Carstens and Stacie C. Carstens, his wife, having heretofore filed in the above-entitled matter their petition praying that the lease entered into between them as lessors and the Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt above named, as lessee, prior to bankruptcy, be declared to have been accepted by the Trustee as an asset of the estate, and the trustee be required to pay to the treasurer of King County or to the petitioners, the taxes upon the premises covered by said lease for the years of 1919 and 1920 and the first half of 1921 in accordance with the provisions thereof, and also by their reply to the Trustee's answer praying that in the event their petition be denied that they be permitted to file a claim against the estate of the above-named bankrupt for the taxes for the year 1919; and the matter having been duly brought on for hearing upon said petition and the Trustee's answer thereto and the petitioners' reply to said answer, and evidence having been

introduced upon the contentions of the respective parties, and the Court being fully advised,

NOW, IT IS HEREBY ADJUDGED AND DECREED that said lease was not accepted or adopted by the Trustee of the above-named estate as an asset thereof, and that the Trustee is liable to the petitioners only for the reasonable rental value of said premises during the period that the same were occupied by him as Trustee, namely: from the date of adjudication, March 20, 1920, to July 1st, 1921, which occupancy was reasonably necessary for the purpose of liquidating and disposing of [14] the business of the bankrupt, and was without objection on the part of the lessors, and that such reasonable compensation is hereby fixed and determined to be the sum of Seven Thousand Three Hundred & Fifty-two and 89/100 Dollars (\$7352.89) in addition to the sum of Six Thousand Five Hundred Twenty-seven Dollars and Sixty-seven Cents (\$6,527.67) heretofore paid by the trustee to the petitioners as monthly cash rental during such period.

AND IT IS FURTHER ORDERED that the petition for leave to file claim for the taxes for the year 1919, be and it hereby is denied.

Done in open court this 14 day of November, 1922.

C. R. HAWKINS,

Referee.

[Indorsed]: Filed this 14 day of Nov. 1922 at 2 o'clock P. M. C. R. Hawkins, Referee. [15]

In the District Court of the United States Western
District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

Petition and Application for Review.

Come now Thomas Carstens and Stacie Carstens, his wife, creditors of the above-named bankrupt, and petition and make application for a review of that certain order of the Honorable Cicero H. Hawkins, Referee in Bankruptcy, to whom the above-entitled cause was duly referred, made on the 14th day of November, 1922, which order denied leave to your petitioners to file an amended claim against the above-named bankrupt for taxes for the year 1919 required under the lease to the bankrupt from said Carstens and wife to be paid by the said bankrupt.

Your petitioners claim that the Referee erred in the following respects and for the following reasons:

That he refused to permit an amended claim to be filed to an informal claim in the form of that certain written demand in the form of a letter dated August 28, 1920, received by the Trustee for the above-entitled bankrupt during the year in which claims of creditors could be filed, which called the attention of the Trustee to the obligation of the bankrupt to pay the 1919 taxes under a lease with

petitioners, which refusal is embodied in the said order of November 14, 1922.

KERR, McCORD & IVEY,
Attorneys for Petitioners. [16]

In the District Court of the United States Western
District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

Agreed Statement of Facts.

Come now Kerr, McCord & Ivey, attorneys for Thomas Carstens and Stacie Carstens, his wife, petitioners for review of an order of November 14, 1922, denying the petitioners the right to file an amended claim in the above-entitled cause, and Robinson, Bronson & Jones, attorneys for J. L. McLean, Trustee, and stipulate the following, and all the material facts necessary to a review of said petition.

I.

That on August 28, 1920, the following letter was mailed from Tacoma, Washington, and in due course of post received by said J. L. McLean, Trustee:

Aug. 28, 1920.

Mr. J. L. McLean, Trustee,
Patterson-MacDonald Shipbuilding Co.,
Seattle, Wash.

Ref: Thos. Carstens' Lease.

Dear Sir:

We had occasion to enquire relative to the real estate taxes for the year 1919, and find that the King County Treasurer's record show that these taxes have not been taken care of by the Patterson-MacDonald Shipbuilding Company for any portion of the 1919 taxes.

We find that the taxes on part of Government Lot 4, West of the East Marginal Way amount to \$7,619.69. The taxes on portion of Government Lot 3, West of East Marginal Way, amount to \$308.-63.

As one-half of the above amounts was not paid previous to May 31st, the full amount is now drawing interest at 12% per annum, which at the present writing would add about 3% to the amount of taxes.
[17]

The treasurer's records show that tax statements were sent to Patterson-MacDonald Shipbuilding Company, as they have done in former years, and no doubt they were received. However, we secured new statements and are forwarding these herewith for your prompt attention.

We trust that you will advise us within the next few days that these taxes have been taken care of,

as we cannot permit this matter to go delinquent any longer.

Yours very truly,
CARSTENS PACKING COMPANY,

By O. F. Kuhl,

OFK:ES

Sec'y-Treas.

That O. F. Kuhl gave testimony as to the said letter, which testimony is attached to this stipulation and marked Exhibit "A"; that the Trustee did not answer the said letter; that the time for filing claims in the said cause expired on March 21, 1921; that the petitioners filed no other claim with the Trustee or the Referee than said letter of August 28, 1920; that the Trustee took possession of the premises on March 21, 1920, and surrendered possession to the petitioners on June 30, 1921, and never accepted said lease as an asset of the estate. That the amount of rental due from the Trustee to your petitioners for use of the premises during the occupancy by the Trustee, was not finally determined until the order of November 14, 1922; that the Trustee, in April of 1921, represented that he would pay an amount for rent which would include payment of the said taxes, but that no agreement was executed that was ratified or approved by the Referee; that the allowance to the petitioner for use of the premises by the Trustee does not include any allowance for the matters covered by the said letter of August 28, 1920; that the said Trustee did not file the said letter of August 28th in the bankruptcy court as a claim against the estate; that there are sufficient funds on hand to pay the said

petitioners the same percentage as has heretofore been paid other creditors, and that there is a possibility that all creditors will be paid one hundred cents on the dollar [18] on their claims; that a lease between the bankrupt and the petitioners contained a clause requiring the bankrupt to pay the annual taxes on the leased premises; that the petitioners claimed that the Trustee had assumed said lease as part of the assets of the bankrupt estate, and that the 1919 taxes referred to in the letter of August 28th should be paid as an expense of administration; that the Trustee, up to March 21, 1921, did nothing to prevent petitioners from filing a claim as creditors in the said estate, and made no affirmative representation that the said 1919 taxes would be paid as a part of the expenses of administration of the bankrupt estate, nor did anything to mislead claimants or influence or induce them not to file claim, nor did the Trustee refuse to pay the same until one of the Trustee's attorneys, after April, 1921, advised the Trustee that the said taxes could not be paid as an expense of administration under the bankruptcy law; that Mr. E. S. McCord, as attorney for petitioners, gave testimony as to advice he had given petitioners of their rights and the duties of the Referee in bankruptcy, which testimony is attached to this stipulation and marked Exhibit "B"; that the Trustee, in answer to the petition requiring him to pay the 1919 taxes as one of the burdens of the lease alleged to have been assumed by him, denied that the Trustee had assumed the said lease, or could assume the same

without the approval of the court, which approval was not given him; that on the said issue the Honorable C. R. Hawkins, as Referee, held in favor of the said Trustee, but awarded the petitioners a reasonable sum for use of the said premises during the time the said Trustee remained in possession thereof; that the petitioners have not sought to review this phase of the said order. [19]

BRONSON, ROBINSON & JONES,

Attorneys for Trustee.

KERR, McCORD & IVEY,

Attorneys for Claimants. [20]

Before the Hon. CICERO R. HAWKINS, Referee
in Bankruptcy.

In the Matter of the Bankruptcy of PATTER-
SON-MACDONALD SHIPBUILDING
COMPANY.

Hearing held October 2, 1922.

Excerpt from the Testimony of E. C. McCord.

Q. (Mr. Jones.) At any rate this conversation which you refer to was prior to there being anything put in writing about the agreement?

A. Yes. There was not any writing, because I told them they did not need anything. I think that Mr. Bronson and Mr. McLean said they would soon have the money and clean it all up.

Q. Didn't you understand that this was a matter which would have to be put up to the Court for approval?

A. No, I didn't think so and I don't think so now. I think at the time my understanding of the law was that the Trustee and Referee had the right to take over the lease or not take it over, and I know at the time the Trustee was appointed I had some doubt, and was consulted by someone about it, and I told him to let it alone; if they took it and the Court recognized it and payments on the lease was made they would have to take the lease with the burdens, and all the burdens. That was my understanding of the law at the time, and it is now.

Q. So that at the time the Trustee was appointed the question was discussed then by Mr. Carstens as to whether he should [21] take some action in regard to the lease? A. Yes.

Q. And it was agreed it should be let alone?

A. I don't know that there was anything as to any action—we didn't intend taking any action. We were hoping they would stay there and pay it, because there was a lot of taxes which were past due, and we wanted to get the thing cleaned up, and no notice was ever given, so far as I know, and not ever intended, to terminate the lease. It was my idea that when they took over the property and continued to use it and pay the cash rental, necessarily under the instructions of the Court that that amounted to acceptance of the lease and that they could not get out of it anyway, at least during the time they were there.

Mr. JONES.—That is all. [22]

(Testimony of O. F. Kuhl.)

Before the Hon. CICERO R. HAWKINS, Referee
in Bankruptcy; Smith Building, Seattle,
Washington, October 2, 1922.

In the Matter of the Bankruptcy of PATTER-
SON-MacDONALD SHIPBUILDING
COMPANY Re Claim of THOMAS CARSTENS.

Testimony of O. F. Kuhl, for Claimant. [23]

O. F. KUHL, produced as a witness on behalf of claimant, being first duly sworn, testifies as follows:

Q. (Mr. KERR.) Are you associated with Mr. Carstens in business?

A. As secretary-treasurer of the Carstens Packing Company I look after Mr. Carstens' private affairs, that is real estate deals and taxes and things of that kind.

Q. And you take care of seeing that the taxes on his properties are paid? A. Yes, sir.

Q. When this lease between the Patterson-MacDonald Shipbuilding Company and Thomas Carstens was made what steps, if any, did you take to see that the tax statements went to the Patterson-MacDonald Shipbuilding Company?

A. I wrote a letter to the county treasurer giving the property that was covered in the lease. It formerly had been assessed as one tract and there was a small triangular part of the land that was on the other side of East Marginal Way that was

(Testimony of O. F. Kuhl.)

not in the lease and, therefore, I had the county treasurer make a segregation of the land for taxing purposes, so that statements would go direct to the Patterson-MacDonald Shipbuilding Company.

Q. Do you know whether the Patterson-MacDonald Shipbuilding Company paid the 1917 and 1918 taxes?

A. I know they paid them, because I called at the treasurer's office and had the certificate made showing that they had paid the taxes. I have a copy of that certificate.

Q. These tax statements show the portion assessed for county and municipal purposes, and also the portion for waterway district? [24]

A. Yes, sir.

Q. It shows it on the face of the statement?

A. Yes.

Q. In the spring or summer of 1920, after Mr. McLean had been elected trustee, did you make any investigation to see if the 1919 taxes had been paid?

A. I did. At one time, in Seattle, I called at the treasurer's office and I got tax statements which I mailed to the receiver, having found out that they were unpaid. That was in August of 1920.

Q. I hand you a copy of a letter marked "F," for identification, and I will ask you to tell what it is.

A. This is a copy of a letter that I wrote to Mr. McLean, trustee, on August 28, 1920, and called his

(Testimony of O. F. Kuhl.)

attention to the fact that the taxes on the property had not been paid.

Q. That is the taxes for 1919?

A. The 1919 taxes.

Q. Did you make a demand there that they be paid?

A. The letter demands that the taxes be paid. Also at the same time I secured new statements and sent in those statements with this letter.

Q. In the spring of 1920 was your attention called to the controversy about the payment of the waterway assessment?

A. It was, in this way. Mr. Pirath, the gentleman, whom Mr. Carstens referred to as having attended to the matter for him; at the time this letter was written he had brought the letter upstairs one evening and gave it to me and he said this was a letter on the arrangement for the trusteeship, on the Patterson-MacDonald Shipbuilding Company's property, [25] in the matter of taxes; and I read it over while he was standing there and my eye fell on this clause appertaining to the commercial waterway and I said, "That certainly must be a mistake, because the Patterson-MacDonald Shipbuilding Company has paid the commercial waterway for 1917 and 1918," and I could not see any reason why it should be eliminated for the succeeding year, and with that he took the letter down to Mr. Carstens' office, and then Mr. Carstens made the trip over to see Mr. McLean about it, the next day I think.

(Testimony of O. F. Kuhl.)

Mr. KERR.—That is all. That letter might go in evidence.

Mr. JONES.—I have no cross-examination of the witness, but I object to the letter as immaterial, but I do not object upon the ground that it is a copy.

(Letter marked Exhibit “F.”) [26]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

Referee's Certificate on Review.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

I, C. R. Hawkins, one of the Referees of said
court in bankruptcy, do hereby certify:

That in the course of the proceedings in said
cause before me an order, which said order is an-
nexed to the petition for review hereinafter re-
ferred to, was made and entered on the 14th day
of November, 1922.

That thereafter Thomas Carstens and Stacie C.
Carstens, his wife, parties in interest, feeling ag-

grieved at said order, filed their petition for review, which was granted.

The material allegations of the pleadings of the respective parties are all to be found in the recitals of the order. The original pleadings are handed up herewith as a part of the record.

That all of the facts material to a review of the order complained of are set out in the agreed statement of facts stipulated by the parties in interest. Said agreed statement of facts is handed up herewith.

The question for review—

Was the referee in error in denying the petition [27] of Thomas Carstens and Stacie C. Carstens, his wife, for leave to file a proof of claim for the amount of the taxes for the year 1919 in view of the law and the facts touching the question at issue.

It will be observed that no proof of debt against said bankrupt estate was ever presented for filing and that the petition of said Carstens and wife filed herein on October 2d, 1922, asking in the alternative that an order be made permitting the petitioners to file an amended claim based upon the letter of their agent referred to in their petition, was not filed until some eighteen months after the time for filing claims had elapsed.

That the letter referred to in said petition, being the letter of August 28th, 1920, signed by Carstens Packing Company and addressed to the trustee in bankruptcy, contained none of the essential elements of a proof of debt, and was not offered or intended as a proof of debt against said estate but

was rather in the nature of a demand for payment by the trustee in full, regardless of the dividend that might be paid to the creditors of said estate and was a notice that if the demand was not complied with, some action would be taken. I think no other construction can be put upon said letter, particularly in view of the last paragraph, which is as follows:

“We trust that you will advise us within the next few days that these taxes have been taken care of as we cannot permit this matter to go delinquent any longer.”

Section 57 A of the Bankruptcy Act 1898 provides as follows:

“Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon and that the sum claimed is justly owing from the bankrupt to the creditor.”

[28]

General Orders of the Supreme Court, Number 21, provides:

“Depositions to prove claims against a bankrupt’s estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in

person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or if the corporation has no treasurer, by the office whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred."

When a claim has been filed against a bankrupt within the time allowed by law, the Courts, I believe, have very generally held that such a claim may be amended after the expiration of the year for filing claims, for the purpose of curing any mistakes or defects in the original proof, but before an amendment can be allowed it must appear that some kind of a claim has been filed within the year allowed for filing claims, or at least that some attempt or intent to file such a claim has been in some way manifested by the claimant.

In this case there was no attempt made to file a claim against said estate. Instead of attempting to put the debt of the petitioners in the way of being allowed and paid with other claims of the

same class by filing a proof of debt as is required by law, it was the manifest purpose and intention of said petitioners to require payment to them in full regardless of the claims of other creditors and not to file a proof of debt and accept such dividend thereon as the estate might be able to pay.
[29]

Under such circumstances I was of the opinion that the petitioners had not put themselves in any position to justify an order permitting them to file a claim some eighteen months after the time for filing such claims had expired.

I hand up herewith as the record in this case:

1. Petition of Thomas Carstens and Stacie C. Carstens, his wife, to which is attached the answer of the Trustee to said petition and the reply and supplemental petition of said Carstens and wife.
2. The petition for review to which is attached the order complained of.
3. Agreed statement of facts.
4. Exhibits.

Dated at Seattle, in said District, May 3d, 1923.

Respectfully submitted,

C. R. HAWKINS,
Referee in Bankruptcy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 4, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [30]

In the United States District Court for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MACDONALD
SHIPBUILDING COMPANY, a Corporation,

Bankrupt.

Decision. Filed June 12, 1923.

August 20, 1920, the following letter was mailed to the trustee by the creditor:

“We had occasion to inquire relative to the real estate taxes for the year 1919, and find that the King County Treasurer’s record show that these taxes have not been taken care of by the Patterson-MacDonald Shipbuilding Company for any portion of the 1919 taxes.

“We find that the taxes on part of government Lot 4, west of the east Marginal Way amount to \$7,619.69. The taxes on portion of government Lot 3, West of East Marginal Way amount to \$308.63.

“As one-half of the above amounts was not paid previous to May 31st, the full amount is now drawing interest at 12% per annum, which at the present writing would add about 3% to the amount of the taxes.

“The Treasurer’s records show that tax statements were sent to Patterson-MacDonald

Shipbuilding Company, as they have done in former years, and no doubt they were received. However, we secured new statements and are forwarding these herewith for your prompt attention.

“We trust that you will advise us within the next few days that these taxes have been taken care of, as we cannot permit this matter to go delinquent any longer.”

The letter was not answered. The time to file claims against the bankrupt estate expired March 30, 1921. No claim was filed by the petitioning creditor other than the above letter. The trustee took possession of the leased premises March 21, 1920, and surrendered possession June 30, 1921. The amount of rental due from the trustee for the use of the premises was finally determined November 14, 1922. In April 1921, the trustee said that he would pay an amount for rent which would include payment of the taxes in issue, but no agreement was executed nor approved by the referee. The allowance to the creditors of rental for the use of the premises does not include the taxes referred to in the letter. The trustee did not file the letter as a claim against the estate. The lease between bankrupt and the petitioning creditors contained a clause requiring the bankrupt to pay the annual taxes on the leased premises, and contained also a provision that upon nonperformance of any of the conditions of the lease the petitioners might repossess themselves of the premises. No representations were made or acts done by either party

which had any bearing upon the filing or nonfiling of the claim against the estate by the petitioners; that on petition being presented requiring the trustee to pay the taxes for 1919, the trustee denied assuming the lease and on the said issue being tried the referee held in favor of the trustee, but awarded to the petitioner a reasonable sum for the use thereof while in the possession of the trustee; that no review of the referee's order was sought. The petitioner contends that the writing of the letter was the presentation of a claim which they now seek to amend, and that in any event the amended claim was tendered within sixty days after the order of the referee fixing the reasonable compensation [31] for the use of the premises, and denying that the trustee assumed the lease.

BRONSON, ROBINSON & JONES, Attorneys
for Trustee.

KERR, McCORD & IVEY, Attorneys for the
Claimant and Petitioners.

NETERER, District Judge.—I think the last statement can be dismissed with the suggestion that it is inconsistent with the amended claim tendered and likewise with the claim which it is sought to establish; and is not consistent with the issue that was determined by the referee, and the claim is not within the scope of Sec. 57a, Bkpcy. Act. Sec. 57a Bkpcy. Act provided that:

“Proof of claims which consist of a statement under oath in writing signed by a creditor setting forth the claim, the consideration there-

for, and whether any, and if so what, securities are held therefor, and whether any, and if so what, payments have been made thereon and that the sum claimed is justly owing from the bankrupt to the creditor.”

General Orders No. 21, of the Supreme Court Rules provide for the form of proof.

Courts are liberal in allowing proofs to be amended and when there is enough in the “original by which to amend,” should be allowed. In re Central Planning Co., 200 Fed. 229.

“The word ‘amended’ came into our language from the French ‘amender,’ the root of the parent word being ‘menda,’ signifying a fault, and in its comprehensive sense meaning to better, and it is sometimes defined as meaning ‘to make better,’ or to change from bad for the better, and ‘amend’ is defined by Webster as meaning to change in any way for the better by substituting something always in the place of what is being removed * * * Diamond vs. Williamsburg Ins. Co., 4 Daly 494, 500.” Words and Phrases, 368.

The proof, required by the Bankruptcy Act, is the perfection by legal evidence and must be in substantial compliance with Sec. 57a, *supra*, and Gen. Orders No. 21. The letter does not meet the requirement. It has none of the essentials required by this section, and upon its face exposes a manifest purpose other than to share in the distribution of the liquidation of the assets of the estate. It was to require the payment of taxes in full, or

I think, the intimation follows that the penalty or default for violation of the condition of the lease would be invoked. I do not think that *In re Baker Bakery Co.*, 285 Fed. 652, or *In re Colman & Titus Corp.*, 286 Fed. 303, cited by the petitioners have any bearing upon the issue presented here, and all of the other cases are in [32] harmony with what is here said. The order of the referee is sustained.

NETERER,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corporation,

Bankrupt.

Decree.

This matter having come on regularly for hearing upon the petition of Thomas Carstens and Stacie C. Carstens, his wife, to review an order of the referee made and entered herein upon the 14th day of November, 1922, denying their application

for leave to file a claim against the estate of the above-named bankrupt, for and on account of taxes for the year 1920, upon the property occupied by the bankrupt, and the matter having been fully argued and submitted, and the Court being duly advised,

IT IS HEREBY ORDERED that the said petition be denied, and the said order of the referee be and it hereby is sustained.

Done in open court this 20th day of June, 1923.

JEREMIAH NETERER,

Judge.

O. K.

Attorneys for Thos. Carstens and Wife.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 20, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [34]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, District Judge of the District Court of the United States for the Western District of Washington, Northern Division:

Thomas Carstens and Stacie C. Carstens, his wife, feeling themselves aggrieved by the decree made and entered in this cause on the 20th day of June, 1923, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith and pray that this appeal be allowed and that citation issued as provided by law and that a transcript of the record proceedings and papers upon which this decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

And your petitioners pray further that a proper order touching the security to be required of them to perfect this appeal be made.

THOMAS CARSTENS and STACIE C.
CARSTENS, His Wife,

By KERR, McCORD & IVEY, and
WM. Z. KERR,

Attorneys and Solicitors.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [35]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

Assignments of Error.

Now, on this 25th day of June, 1923, come Thomas Carstens and Stacie C. Carstens, his wife, by their solicitors and attorneys and say that the decree entered in the above cause on the 20th day of June, 1923, is erroneous and unjust to the defendant.

I.

Because it fails to allow the petitioners a claim against the estate of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, in the sum of \$7,928.32, with interest thereon.

II.

And because it fails to permit the petitioners to file a formal claim as an amended claim to a letter of August 20, 1920, addressed and delivered to the trustee of the said bankrupt.

III.

And because the said decree fails to permit the petitioners to treat the said letter of August 20, 1920, from the petitioners to the said trustee, as an informal claim, capable of being amended by petitioners under section 57N of a Bankruptcy Act of 1898, as amended.

IV.

And because said decree fails to permit the petitioner to file formal proof of claim within sixty (60) days after the determination of an amount due from the trustee for possession of the property held by the bankrupt under lease from [36] the petitioners, to wit: Within 60 days from November 14, 1922, made by the Honorable C. R. Hawkins, Referee in Bankruptcy, before whom the said proceedings were heard.

WHEREFORE petitioners pray that the said decree be reversed and that an order be made directing that the petitioners be permitted to file said claim.

KERR, McCORD & IVEY and WM. Z. KERR, Solicitors and Attorneys for Thomas Carstens and Stacie C. Carstens, His wife.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [37]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

Order Allowing Appeal.

On the 25th day of June came Thomas Carstens and Stacie C. Carstens, his wife, and filed herein and presented to the Court their petition praying for an allowance of an appeal, together with an assignment of errors, intended to be urged by them and praying that a transcript of the proceedings be prepared and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE IT IS ORDERED that the petition be granted and the appeal allowed as prayed for in the sum of \$500.00.

Dated this 25th day of June, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [38]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Thomas Carstens and Stacie C. Carstens,

his wife, as principals, and the American Surety Company of New York, a corporation, authorized to engage in the surety business in the State of Washington, as surety, acknowledge themselves to be jointly indebted to J. L. McLean, Trustee in Bankruptcy for Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, the appellee in the above cause, in the sum of \$500.00 conditioned that

WHEREAS on the 20th day of June, 1923, the District Court of the United States, District of Washington, Northern Division, in a suit pending in that court wherein Thomas Carstens and Stacie C. Carstens his wife, were petitioners and said McLean as trustee in bankruptcy of Patterson-MacDonald Shipbuilding Company, a corporation, as bankrupt, was respondent, number on the Bankruptcy Docket, 6361, a decree was rendered against the said Thomas Carstens and Stacie C. Carstens, his wife, have obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree and a citation directed to the said J. L. McLean, as trustee, citing and admonishing him to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, [39]

Now if the said Thomas Carstens and Stacie C. Carstens, his wife, shall prosecute this appeal to effect and answer all costs, if they shall fail to

make their prayer good, then this obligation to be void else to remain in full force and virtue.

THOMAS CARSTENS and
STACIE CARSTENS, His Wife,
By KERR, McCORD & IVEY and
WM. Z. KERR.

AMERICAN SURETY COMPANY
OF NEW YORK.

[Corporate Seal]

By A. E. KRULL,
A. E. KRULL

Resident Vice-president.

Attest:

B. L. JOLLY,
B. L. JOLLY,

Res. Asst. Secretary.

Approved: June 29th, 1923.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 29, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [40]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO., a Corporation,
Bankrupt.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Will you please prepare a transcript for use on appeal in the above-entitled cause, by Thomas Carstens and wife, from the decree entered by the Honorable Jeremiah Neterer on the 23d day of June, 1923, denying leave of the appellants to file claim in the above-entitled estate, which transcript shall contain the portions of the record in the said cause as follows:

1. Petition of Thomas Carstens and Stacie Carstens, his wife, transmitted to the Court with a certificate of C. R. Hawkins, the referee to the above-entitled court of May 3, 1923.

2. The answer to the said petition.

3. The reply and supplemental petition of Carstens and wife.

4. The petition for review of the order of C. R. Hawkins, made on the said appeal.

5. Agreed statement of facts and exhibits attached thereto and decree of Honorable Jeremiah Neterer of June 20, 1923.

6. Petition for allowance of appeal.

7. Assignments of error.

8. Order allowing appeal.

9. Bond on appeal.

10. Praecipe and stipulation as to contents of transcript, and citation.

KERR, McCORD & IVEY and

WM. Z. KERR,

Attorneys and Solicitors for Thomas Carstens and
Stacie Carstens, His Wife. [41]

Rec'd copy June 27, 1923.

BRONSON, ROBINSON & JONES,
Attorneys for Appellee.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 29, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [42]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO.,

Bankrupts.

Stipulation Re Addition to Record.

IT IS HEREBY STIPULATED by counsel for Thomas Carstens and Stacie Carstens, his wife, and J. L. McLean, Trustee, in the above-entitled estate, that the Clerk may prepare transcript of the matters requested in the appellant's praecipe, and also the following:

1. Order of C. R. Hawkins, Referee, denying right of Carsten's wife to amend claim.
2. Certificate of review by C. R. Hawkins.

3. Opinion of Honorable Jeremiah Neterer, of
June 12, 1923.

KERR, McCORD & IVEY, and
WM. Z. KERR,

Attorneys for Thomas Carstens and Stacie Cars-
tens, His Wife.

BRONSON, ROBINSON & JONES,
Attorneys for J. L. McLean, Trustee.

[Indorsed]: Filed in the United States Dis-
trict Court, Western District of Washington,
Northern Division. Jul. 2, 1923. F. M. Harsh-
berger, Clerk. By P. A. Page, Deputy. [43]

In the United States District Court for the West-
ern District of Washington, Northern Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a Corpora-
tion,

Bankrupt.

THOMAS CARSTENS and STACIE C. CARST-
TENS, His Wife,

Appellants,

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy
of PATTERSON-MacDONALD SHIP-
BUILDING COMPANY, a Corporation,
Bankrupt,

Appellee.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I. F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 43, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by praecipe and stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the appellants herein, for making record, certificate or return to the United States Circuit [44] Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.) for making
record, certificate or return, 93 folios
at 15¢ \$13.95
Certificate of Clerk to transcript of record,
4 folios at 15¢60
Seal to said certificate20

I hereby certify that the above cost for prepar-
ing and certifying record, amounting to \$14.75,
has been paid to me by attorneys for appellants.

I further certify that I hereto attach and here-
with transmit the original citation issued in this
cause.

IN WITNESS WHEREOF, I have hereto set
my hand and affixed the seal of said District Court,
at Seattle, in said District, this 17th day of July,
1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [45]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 6361.

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING CO.,

Bankrupts.

Citation.

United States of America to J. L. McLean, Trustee
in Bankruptcy, of Patterson-MacDonald Ship
Building Co., GREETINGS:

You are hereby notified that in the above-entitled cause in bankruptcy in the United States District Court in and for the Western District of Washington, Northern Division, in a matter wherein Thomas Carstens and Stacie Carstens, his wife, are petitioners and J. L. McLean, as Trustee in Bankruptcy, is respondent, an appeal has been allowed the said petitioners therein to the Circuit Court of Appeals of the United States, Ninth Circuit. You are hereby cited and admonished to be and appear in the said Court at San Francisco 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, Northern Division, this 2d day of July, 1923.

JEREMIAH NETERER,
Judge.

Attest: [Seal] F. M. HARSHBERGER,
Clerk.

By P. A. Page, Deputy.

Admission of service of the foregoing citation made this 2d day of July, 1923.

BRONSON, ROBINSON & JONES,
Attorneys and Counsel for J. L. McLean, Trustee in
Bankruptcy of Patterson-MacDonald Ship
Building Co.

Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 2, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [46]

[Endorsed]: No. 4059. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt. Thomas Carstens and Stacie C. Carstens, his Wife, Appellants, vs. John L. McLean, as Trustee in Bankruptcy of Patterson-MacDonald Shipbuilding Company, a Corporation, Bankrupt, Appellee, Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 21, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 4059

In the Matter of PATTERSON-MACDONALD
SHIPBUILDING COMPANY, a corporation, Bank-
rupt;

THOMAS CARSTENS and STACIE C. CAR-
STENS, his wife, *Appellants*

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of
PATTERSON - MACDONALD SHIPBUILDING
COMPANY, a corporation, Bankrupt, *Appellee*

APPELLANTS'
OPENING BRIEF

KERR, McCORD & IVEY, and WM. Z. KERR
ATTORNEYS FOR APPELLANTS

1309 HOGE BUILDING, SEATTLE, WASHINGTON

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 4059

In the Matter of PATTERSON-MACDONALD
SHIPBUILDING COMPANY, a corporation, Bank-
rupt;

THOMAS CARSTENS and STACIE C. CAR-
STENS, his wife, *Appellants*

vs.

JOHN L. McLEAN, as Trustee in Bankruptcy of
PATTERSON - MACDONALD SHIPBUILDING
COMPANY, a corporation, Bankrupt, *Appellee*

APPELLANTS'
OPENING BRIEF

STATEMENT OF THE CASE

On November 1, 1917, the appellants, Thomas Carstens and Stacie C. Carstens, his wife, were the owners of a tract of approximately twenty-five acres of land situated on the Duwamish Commercial

Waterway in King County, Washington, suitable for a shipbuilding plant. At that time a written lease was executed by the appellants and the Patterson-MacDonald Shipbuilding Company, a corporation, for a term of five years from June 1, 1917, at an annual rental of \$5,000 payable monthly in advance during the said term and in addition to the said rental the lessee agreed to pay the annual taxes on the property commencing with those falling due after the date of the lease.

The Patterson-MacDonald Shipbuilding Company entered into possession of the property, constructed their plant, and paid the rent stipulated in the lease up to and including the month of March, 1920, at which time the company was adjudged a bankrupt. John L. McLean, the appellee, was elected and qualified as trustee in bankruptcy. He continued in possession of the premises until July 1, 1921, making the monthly cash payments required by the lease under the order of the referee, but he made no payment of the annual taxes.

At the time of the surrender of the premises by the appellee to the owners a question arose as to what portion of the taxes required by the lease to be paid by the bankrupt, should be paid by the trustee. The appellants claimed that the trustee should

pay all of the 1919, 1920 and six-twelfths of the 1921 taxes. The trustee claimed that he should not pay any of the 1919 taxes. As to the 1920 and six-twelfths of the 1921 taxes, the trustee claimed that the term taxes should exclude the assessment for Commercial Waterway in any event.

After the bankruptcy within the year for the filing of claims the appellants made a demand on the trustee by letter for the payment of the 1919 taxes. (Exhibit "A," p. 12 Trans.) They consulted their attorney as to what should be done to insure them the payments required in the lease and he advised them that if the trustee remained in possession, paying the amounts called for in the lease, that that would amount to a ratification and acceptance of the lease *cum onere* as an asset of the estate, requiring the trustee to pay the 1919 tax.

Acting upon this advise and upon the continued payments of the monthly rental no claim was filed for the 1919 taxes other than the informal demand in the letter of August 28, 1923, Exhibit "A."

Upon appropriate petition, answer and reply after evidence had been heard, the referee made an order that the "lease was not accepted or adopted

by the trustee . . . as an asset" of the estate. (Trans. p. 15.) The reasonable rental was fixed for the period of occupancy by the trustee and the referee further ordered that the petition for leave to file claim for the taxes for the year 1919 be denied. (Trans. p. 15.)

The appellants sought a review by the District Court of the portion of the order denying leave to file an amended claim but acquiesced in the amount awarded as a reasonable value of the use of the premises during the trustee's possession.

Upon agreed facts (Trans. p. 17) the District Court sustained the referee's order. (Trans. pp. 35-36.) This appeal followed.

The question involved is whether or not the appellants, after the year for filing claims has expired can be permitted to file an amended claim to the letter of August 28, 1921. If not, can the claim be filed within sixty days after the liquidation of the obligations incidental to the lease.



ASSIGNMENT OF ERRORS

The decree of the District Court is erroneous and unjust to the appellants in that: (Trans. p. 38)

I

It fails to allow the petitioners a claim against the estate of Patterson-MacDonald Shipbuilding Company, a corporation, bankrupt, in the sum of \$7,928.32, with interest.

II

It fails to permit the petitioners to file a formal claim as an amended claim to a letter of August 20, 1920, addressed and delivered to the trustee of the said bankrupt.

III

The said decree fails to permit the petitioners to treat the said letter of August 20, 1920, from the petitioners to the said trustee, as an informal claim, capable of being amended by petitioners under section 57 of the Bankruptcy Act of 1898, as amended.

IV

The said decree fails to permit the petitioner to file formal proof of claim within (60) sixty days

after the determination of the amount due from the trustee for possession of the property held by the bankrupt under lease from petitioners, to-wit: within (60) sixty days from November 14, 1922, made by the Honorable C. R. Hawkins, referee in bankruptcy, before whom the said proceedings were heard.



ARGUMENT

Section 57a of the Bankruptcy Act of 1898 provides:

“Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what securities are held therefor, and whether any, and, if so what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.”

Section 57n provides:

“Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, and then within sixty days after the rendition of such judgment: Provided, That the rights of infants and insane persons without guardians, with-

out notice of the proceedings, may continue six months longer."

General orders of the supreme court, No. 21, provides the form of the deposition approved for the filing of claims.

The letter relied upon by the appellants as an informal claim (Exhibit "A," Trans. p. 12), is as follows:

"Aug. 28, 1920.

"Mr. J. L. McLean, Trustee,
Patterson-MacDonald Shipbuilding Co.,
Seattle, Washington.
Ref. Thos. Carstens' Lease.

"Dear sir:

"We had occasion to enquire relative to the real estate taxes for the year 1919, and find that the King County treasurer's record show that these taxes have not been taken care of by the Patterson-MacDonald Shipbuilding Company for any portion of the 1919 taxes.

"We find that the taxes on part of Government Lot 4 west of East Marginal Way amount to \$7,619.69. The taxes on portion of Government Lot 3, west of East Marginal Way amounts to \$308.63.

"As one-half of the above amounts was not paid previous to May 31st, the full amount is now drawing interest at 12% per annum, which at the present writing would add about 3% to the amount of taxes.

“The treasurer’s records show that tax statements were sent to Patterson-MacDonald Shipbuilding Company, as they have done in former years, and no doubt they were received. However, we secured new statements and are forwarding these herewith for your prompt attention.

“We trust that you will advise us within the next few days that these taxes have been taken care of, as we can not permit this matter to go delinquent any longer.

Yours very truly,

CARSTENS PACKIN GCOMPANY,

OFK:ES

By O. F. KUKL,
Secretary-Treasurer.”

The letter fails to comply with the statute or the general orders as a proof of claim in the following respects:

- (1) It was not filed with the referee within one year of the adjudication of bankruptcy.
- (2) It is not under oath.
- (3) It is not signed by the creditor, nor does it state why an agent signs.
- (4) It does not show what if any security is held.
- (5) It does not give the title of the court or cause.

The letter complies with the statute in the following respects:

- (6) It is in writing.
- (7) It sets out the claim.
- (8) It sets for the consideration.
- (9) It states that no payment has been made.
- (10) It clamis that the amount is justly owing.

A claim presented within the year, though fatally defective, may be amended after the year for filing claims that have expired.

In *Hutchinson v. Otis*, the Circuit Court of Appeals for the First Circuit, 115 Fed. 937, passing upon the right to file an amended claim after the year had elapsed, used the following language:

“Within the year limited by the statute for proof of claim in bankruptcy, Otis, Wilcox & Company filed a proof which failed in every substantial particular, to comply with the general orders of the supreme court with reference to such matters. Subsequently, after the expxiration of the year, they filed a substituted proof of claim, alleged to be secured, in part, by that portion of the proceeds of the sale of the bankrupt in the New York stock exchange which had been paid over to the trustee. . . . We now come to the appeal. The only ground to which it can relate is the objection to the sub-

stituted proof because it was not filed within the year limited by the terms of the statute. This, however, is easily disposed of. The courts of bankruptcy, like the courts of admiralty, permit amendment with the most liberal hand, and as there was enough in the original proof by which to amend, and as the District Court thought it was equitable to allow the amendment, the appeal can not be maintained."

This case was appealed to the supreme court, where Justice Holmes in *Hutchinson v. Otis, Wilcox & Company*, 190 U. S. 552, 23 S. C. Rep. 778, said:

"The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee, more than a year after the adjudication, the facts having been agreed in the meantime, and an appeal taken. It is argued that the allowance of the amendment is within section 57n, forbidding proof subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon can not be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad."

Great liberality has existed since this decision in the matter of amendment of defective claims.

(1) *Necessity of Filing with
Referee Within Year.*

The letter was presented to the trustee in August, 1920. The adjudication of bankruptcy was in March, 1920. It was therefore sufficiently filed within the year.

Orcutt Company v. Green, 204 U. S. 96, 51
L. Ed. 390, 27 S. C. R. 195.

“Where a claim is duly presented to the trustee within the year, it is sufficient compliance with the requirements of the statute, although not delivered to the referee until after that time.”

Collier, Bankruptcy, Twelfth Edition, page
820.

2 Remington, Bankruptcy, Sec. 881.

(2) *Necessity of Claim
Being Under Oath.*

There are many cases where the oath has been defective or no oath attached to an informal claim where amendment was allowed almost as of course.

*In re Patterson - MacDonald Shipbuilding
Co.*, 288 Fed. 546.

In re Stevens, 107 Fed. 243.

In re Roeber, 127 Fed. 122, the Circuit Court of Appeals of the Second Circuit considered a situa-

tion where sixteen months after the adjudication a creditor sought to amend a claim that had not been sworn to. The court said in part:

“In the course of the proceedings, and on March 2, 1902 (within the year), there was filed in the District Court a document inartificially drawn if considered as a ‘proof of claim,’ but which contained averments that there was due and owing to Louis Bossert and Son the sum of \$2,985.13 for materials furnished to the bankrupt in the erection of a building for said Leiser, and that the certain sum of money then paid by Leiser into court was security therefor. This document was signed by the attorney for Louis Bossert and Son, but was not sworn to. It contains similar averments as to the Otto E. Reimer Co., and is similarly signed by them. If this be considered a claim, it was filed in time. The District Court has now allowed this document, which already contained a ‘statement setting forth the claim, the consideration therefor, whether any, and if so what securities are held therefor, and that the sum claimed is owing from the bankrupt to the creditor,’ and which is signed by the creditor, to be amended so as to conform to the requirements of the act; thus allowing the addition to it of the statement that no payments have been made thereon (a fair and natural inference from the original), and the oath of the creditor.

“Bankruptcy courts have the usual power of court of justice, upon motion and for good cause, to allow amendments. All parties were advised of the claim within the year. There is no dispute that

the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice, and within a legitimate exercise of the power of amendment, under the authorities. In re Craft, 6 Blatchf. 177, Fed. Cas. No. 3317. In re Gallinger, Fed. Cas. No. 5202.”

*(3) Necessity of Claim Being Signed by
Creditor, or Stating Why An
Agent Signs.*

The letter of August 28, 1920, addresses the trustee's attention thus: “Ref: Thos. Carstens' Lease.” The letter shows that the writer is concerned with the particular property leased and in the obligation of the lessee to pay the annual taxes.

O. F. Kuhl, who wrote the letter, gave testimony that he looks after Mr. Carstens' private affairs, real estate deals, taxes and everything of that kind; that he saw to it that taxes are paid (Trans. p. 23), that in August, 1920, he procured statement of the 1919 taxes and by the letter of August 28, 1920, demanded that the taxes be paid. (Trans. p. 24.)

His attention was called to a controversy about the payment of the portion of the waterway assessment and the trustee's proposal to eliminate it for the taxes succeeding 1917 and 1918; he took the letter to Carstens and then Carstens made a trip to see McLean about it. (Trans. p. 25.)

This shows that Kuhl was acting as Carstens' agent in making the claim by letter of August 28, 1920. That the demand was made as the act of Carstens, though irregularly through an agent without the agent complying with the directions of the general order.

In *In re McCarthy Portable Elevator Co.*, 205 Fed. 986, the referee disallowed a claim of McKiernan on the ground that the proof showed that the claim was owned by one Keeney. The court held that even though this were true, that the claim could be amended so as to permit Keeney to obtain the benefit of it, and said:

"The clause requiring the proving of claims within the year, while in the nature of a limitation upon the creditors' rights, is clearly intended to facilitate the liquidation of bankrupts' estates. To administer such estates, it is needful to know the amount of the claims that are to share the assets, and the year limit for proving such claims is primarily for such purpose. That it operates to exclude claims not proven within such period is but incidental. To refuse recognition of a meritorious claim, though filed within the prescribed year, because not presented by the then owner, is not justified by the language of such clause, and to do so would be to do violence to the spirit and purpose of the enactment. In the present case the claim proved disclosed its true nature and consideration. It having been

filed within the year, it gave all the needed information to permit the carrying out of the primary purpose of the year's limitation."

In re A. J. Ellis, Inc., 252 Fed. 483, the Circuit Court of Appeals of the Third Circuit, permitted bondholders to file amended claims to the claim of the trustee for the bondholders where there was a dispute whether the corporation acting as trustee had the right to use its own name while collecting the money for the bondholders. The court quotes the language of the District Court with approval:

" 'One of the chief objects of the law regulating the administration of estates in bankruptcy is to secure a fair division thereof among creditors and if the litigation of the rights of the trustee to file proof of claim for the bondholders was a litigation within the meaning of section 57 of the Bankruptcy Act of 1898, the petitioners should be allowed to amend the proof of claim as prayed.' "

Further on in the opinion:

"The only mistake (if mistake it were) consisted in failing to set forth positively that the real creditors were themselves asserting their conceded right, and that the company was merely agent. The equities are plainly with the bondholders, and fortunately we see no reason to doubt the court's power to afford relief. If the question were before the New Jersey Court of Errors and Appeals, it seems clear that the substitution of one plaintiff for an-

other would be allowed, and we do not think the equitable power of a court of bankruptcy is more restricted. See, also, *In re Roeber*, 127 Fed. 122, and *In re McCarty Co.*, 205 Fed. 986. In a word the proof as originally filed was expressly on behalf of the bondholders and asserted their rights. It may be that the company had taken too much on itself—upon that point we intimate no opinion—but in any event, as the step had been taken in good faith, and as all the facts had been clearly and seasonably stated, we think the District Court was right in allowing the real parties in interest to make the company's place on the record."

In re Standard Telephone Co., 186 Fed. 586.

The bankrupt did not owe the Carstens Packing Co. or O. F. Kuhl any amount of taxes on this property but it did owe Thos. Carstens the amount claimed. The only reasonable inference from the claim is that it is being made for Carstens benefit.

(4) *Necessity of Showing What Security Was Held.*

The statute requires a statement of what if any security is held. No one can be harmed by the filing of a claim without a statement so long as the creditor has not received a dividend upon his claim or in fact holds no security. Courts have permitted claimants that made no statement of the security and filed as unsecured claimants through error and

without fraud to amend the claim after the expiration of the year.

In re Frisk & Robinson, 185 Fed. 974, the syllabus of Judge Hand's decision on the subject is as follows:

"Where an original claim was filed against a bankrupt's estate within the time required, the referee, after the expiration of a year from adjudication, may permit an amendment of the claim before the claimant has received a dividend, so as to correct a waiver of security."

In support of this position are cited:

In re Wilder, 101 Fed. 104.

In re Myers, 99 Fed. 691.

In re Falls City Shirt Mfg. Co., 98 Fed. 592.

In re Hubbard, Fed. Cas. No. 6813.

(5) *Necessity of Statement of Title of Court or Cause.*

The letter is addressed to the proper person who was in charge of the affairs of the bankrupt and was received by him. He knew of the Carstens' lease and was paying the monthly rent reserved therein.

Judge Archbald in *In re Blue Ridge Packing Co.*, 125 Fed. 619, said:

“Objection is made to the allowance of the claims of W. M. Alexander and A. G. Helfrich because the title of the court is not given at the head of the proof in accordance with general order 21 and form No. 31. But this is a mere informality, not enough to vitiate the proof if otherwise good, as it appears to be. There are other signs of carelessness in it, but the substance is there, and I think the claim was properly received.”

(6) The claim complies with the statute by being in writing. (7) It sets out the demand or claim. (8) It sets forth the consideration. (9) It states that no payments have been made, and (10) it asserts that the amount is justly due.

Had it failed to be in writing that defect could have been amended. *In re Salvator Brewing Co.*, 188 Fed. 522, 193 Fed. 989. Had it not demanded or claimed an indebtedness against the bankrupt it might not have been amendable, but if it did not evidence an intent to abandon a claim or to rely on security instead of its share of the estate it would be amendable. *In re Thompson*, 227 Fed. 981. Had it failed to state the consideration that defect could have been amended. *In re Welborne*, 266 Fed. 385, it was said:

“In the case at bar, the orderly procedure would have been to require the claimant to amend his

proof of claim to the extent necessary to conform with the Bankruptcy Act and rules: i. e., to make clear upon the face of the claim at least the nature of the agreement. As, however, the referee, in order to save time which might have been lost by an adjournment, permitted the claimant to supplement the defects of the claim, by oral testimony, this testimony will be regarded as written into the claim, and as now constituting the claimant's claim. As such the claim in accordance with settled authority "amounts to a *prima facie* case.' "

From the foregoing it is evident that great liberality exists in the matter of allowing amendments to informal claims.

This court permitted the amendment of a claim filed on an open account to change the cause to proof upon a promissory note after the year for filing claims had elapsed, in *In re Central Grain Company*, 200 Fed. 229. Pointing out that no rights of third persons were prejudiced, Judge Hunt, speaking for the court said:

"The principle of a liberal authority to amend claims in bankruptcy has found repeated approval in decisions, and where, as in this instance, there was enough in the original proof by which to amend and the District Court has approved of the amendment, an appellate court should be reluctant to disturb the ruling. *In re Myers*, 99 Fed. 691; *In re Roeber*, 127 Fed. 122; *In re Kissler*, 184 Fed. 51; *Hutchinson v. Otis, etc. Co.*, 190 U. S. 552."

In *In re Jones Dry Goods Co.*, 223 Fed. 318, the Circuit Court of Appeals of the Eighth Circuit speaking of the essentials of a proof of claim, said:

“All that is required is to state that the bankrupt is indebted to the claimant in a certain amount of money, what the consideration of the debt was, and that no part of it has been paid. Referring again to the proof of claim as made out by the trust company in this case, it appears that it complied with all the provisions of the law in making its claim. It set forth the amount of its debt and alleged the consideration to have been a loan by it to the Jones Dry Goods Company of the sum of \$15,000.”

In *In re Thompson*, 227 Fed. 981, the Circuit Court of Appeals of the Third Circuit refused to allow an amendment to a letter from the claimant to the trustee in response to a request by him as to the amount of the debt and the amount and character of the collateral. The court said:

“Much liberality has been shown by the courts in permitting imperfect claims and proofs of claims to be put into proper form after the statutory period has expired, but we are advised of no decision that runs counter to the positive language of the act and permits a claim that is wholly new to be presented after the limitation has run. In some form the substance of a claim must have been made within the proper time, but if this had been done amendments may be made afterward. *Whether formal*

or informal, a claim must show (as the word itself implies) that a demand is made against the estate, and must show the intention to hold the estate liable."

The Honorable District Court in the present case was of opinion that the letter does not meet the requirement of section 57a or the General Orders No. 21. "It has none of the essentials required by this section, and upon its face exposes (a) a manifest purpose other than to share in the distribution of the liquidation of the assets of the estate. (b) It was to require the payment of taxes in full, or I think, the intention follows that the penalty or default for violation of the condition of the lease would be invoked." (Trans. pp. 34-35.)

We submit that the conclusion is unsound. The letter demands payment of the representative of the estate and that he make the payment on the same basis as the bankrupt had paid under the lease. It most certainly evidences an intention to require the representative to make the payment. There is no hint that the demand for the money will be abandoned.

(a) Does the letter manifest a purpose not to share in the distribution of the assets of the estate? First let us ask if a manifestation of such an in-

tent destroys the validity of a claim, and if the intention of the claimant is essential to the validity of the claim so long as there is no fraud or bad faith.

In *Bennett v. American Credit Indemnity Company*, 159 Fed. 624, a question arose as to whether a claim mailed to the referee had been received by the referee. The referee, however, had received an assignment of the claim of a creditor of the bankrupt to the American Credit Indemnity Company, from that company, and the Circuit Court of Appeals of the Sixth Circuit, as well as Judge Cochran, District Court, were of opinion that the assignment which was received by the referee was sufficient in form so that an amended claim might be filed, making it a valid claim under the Bankruptcy Act.

In this decision of course there was no intention on the part of the claimant that the assignment received by the referee should be considered as a claim, yet it did evidence the existence of an indebtedness and the ownership of a claim that had been asserted though not filed within the year.

The Circuit Court of Appeals for the Second Circuit, in the case of *In re Kessler*, 184 Fed. 51, had before it the consideration of a letter accom-

panied by an account sent to an assignee for the benefit of creditors, by a Paris creditor, before bankruptcy. A lawyer representing this creditor called upon the receiver after bankruptcy, and asked if he had received a claim from the assignee of the bankrupt. The receiver said that it was all right. The court referred to the Orcutt & Company case cited above, and held that the leaving the claim with the trustee in bankruptcy was a sufficient filing, without filing the same with the referee, and then said:

“It would be harsh and inequitable to refuse them relief upon the statement of facts above recited, if there were power to grant it. It is not disputed that the papers sent to the assignee, and by him turned over to the receiver, do not comply with the requirements of the statute; but it has been repeatedly held that ‘a proof of claim’ which is defective in some substantial particular may be amended, and that such amendment may be made subsequent to the expiration of one year after adjudication, although the effect of such amendment may be that ‘proof of claim’ is hereby effectively made only after the year limited by section 57n. The great liberality of the courts in that regard is shown by an analysis of some of the decided cases.”

Several cases are then reviewed, and the court continues:

“We do not understand that the district judge refused to allow the amendment as an exercise

of discretion, but did so because he was not satisfied that the testimony showed that there had been filed within the year a written statement which contained enough by which to amend. The account and letter sent by Heine & Co., showed the details of transactions with Kessler & Co., and that the result of those transactions was that the latter firm was indebted to the former in a stated sum. We do not concur with the conclusion that it did not contain in writing any indication that it is a claim against the bankrupt estate. It was not sent until after assignment, and was expressly sent, not to Kessler & Co., but to the assignee as a claim against their estate. It did not contain any statement in reference to security, nor was it verified, nor was it in the form prescribed; but it certainly notified the assignee and—when it was by him turned over to the receiver—notified the latter that Heine & Co. claimed that the estate of Kessler & Co. owed the stated sum of money as a result of transactions therein set forth.”

In the foregoing case it can hardly be contended that there existed any intention on the part of the creditor that the letter should be filed as a claim. When the creditor sent the letter, bankruptcy had not yet occurred. It was sent to representatives to be lodged with an assignee. Certainly if the mental attitude of the creditor is to determine the validity of a claim the decision of this case is wrong. But is not the decision sound? Why should the letter not be treated as an informal claim? The other

creditors have done nothing for which they should be rewarded by swelling their dividends at the expense of this creditor. The creditor, it is true has been careless, but his fault has harmed no creditor and he has been culpable of no fraud.

In *In re Fairlamb*, 199 Fed. 278, after bankruptcy, creditors considered the matter of making a settlement, and a petition was circulated in which creditors signed their names, indicating a willingness to accept a portion of their claims. This petition set up the amount of the claim, was signed by the creditor and filed by the trustee in bankruptcy with the referee, within the year. The compromise was not effected. After the year, the petitioning bank, a creditor, asked leave to amend its claim so as to have the benefit of the full indebtedness against the bankrupt. This was granted, the court saying:

“I am of the opinion that the agreement filed with the referee, signed by the bank, setting out the amount of its claim and the securities which it agreed to accept, under the circumstances of this case, was sufficient in substance to constitute an amendable claim, and that it would be inequitable to permit the petitioner to enjoy the fruits of a settlement, which could not have become effective without the bank’s assent, and to largely increase its dividend by forbidding the bank to be put in the position of having its claim allowed when the peti-

tioner, together with all other creditors, was fully advised of the amount of the bank's claim."

In the foregoing case how can it be said that there was any intention on the part of the creditor that settlement agreement should be a claim on the estate. Its purpose was not a demand upon the estate but a release of demand, an assertion of a willingness to abandon a claim against the estate.

In re Salvator Brewing Co., 188 Fed. 522, was a case where directors of a corporation indorsed notes of the company that became insolvent. They were required to pay the notes and took securities which they were forced to surrender in the bankruptcy proceedings. They were permitted to file amended claims after the year based on their *oral testimony* taken before the referee on the hearing on the validity of the assignment. On the appeal in the Circuit Court of Appeals (193 Fed. 989) the court said:

"The testimony taken in proceedings before the referee presented all the facts necessary to establish Meyer's claim. This was not in the shape of a formal proof, it is true, but it can not be questioned that the records of the bankruptcy court contain proof that these directors have a valid claim against the estate. It was but a reasonable exercise of its discretion for the court to permit an amendment,

conforming the proof to the rules and practice of the court; the fact being undisputed that its own records informed the court that a perfectly valid claim existed."

Have the appellants done differently in the present case? Assuming that they were demanding full payment of the trustee, this must have been a demand for a "distribution of the liquidation of the assets of the estate," for with what other fund could the trustee make payment? The trustee had nothing else to apply upon the claim of the appellants.

(b) But has not His Honor erred in concluding that the letter was intended as a demand of full payment of the taxes or a declaration of default under the lease?

McCord's testimony is that Mr. McLean said they would soon have the money to clean the matter up; that he didn't think that the agreement of the trustee to pay the taxes had to be approved by the referee; that if the trustee took over the lease and the court recognized it and payments on the lease were made, that they would have to take it with all of the burdens. (Trans. pp. 21-22.)

Both the referee and the district judge impute an intention on the part of the appellants to declare the lease forfeited. But this shows that that was

never the intention of the appellants. They claimed that the trustee should perform the conditions of the lease and demanded that all of the payments be made from the assets of the estate. If the words of the letter could be construed on first blush as a threat of forfeiture, no forfeiture could have been enforced to the extent of summarily removing the trustee from possession of the premises.

The trustee, as pointed out in his answer to the petition of the appellants, has a reasonable time in which to dispose of the assets of the estate and can only be charged a reasonable rental for the premises in the meantime. (Trans. p. 8.) Does it lie in his mouth to say that from March, 1920 to July, 1921 is such a reasonable time and then assume that the letter of August 28, 1920, was a demand by appellants for immediate possession of the premises? If the letter was a demand and declaration of intention to forfeit the lease there was no intention of the appellants to make a gratuity of the 1919 taxes for a surrender of the possession of the property. Suppose the trustee had immediately surrendered the possession of the property to the appellants on receipt of the letter, the bankrupt would still be liable for the taxes and appellants could have shared in the estate. In other words this is not the case of

the creditor saying, "There is a debt due me, but I may avail myself of some other means of satisfaction." It is a demand that the debt be paid.

But if the creditor claims that the trustee should make a full payment of his particular debt in preference to other creditors, is it inequitable to allow his claim?

In this connection it should be noticed that both the referee and the district judge took the position that there was not the substance of a claim here to amend, and not that the appellants had not acted in good faith. The facts show that no imputation of bad faith can be made against the appellants. They were advised that if the trustee continued in possession of the premises paying the monthly rental reserved in the lease that he would thereby assume the lease with its burdens, and that they need do nothing except rely on the oral promise of the trustee to make the payments. No one questioned the obligation of the trustee to make the payments until after the year for making claims had expired. Then, when the appellants sought the relief they had been advised they were entitled to, it developed that there had been a mistake of fact or law in this; no order had been made by the referee authorizing an acceptance of the lease as an asset

of the estate. The appellants were attempting to enforce a right that did not exist. They could show no more than a continued possession by the trustee and an incompleted agreement on his part to make the payments. They could not show any approval by the court.

In re Frazin, 183 Fed. 28.

In re Dushane v. Beall, 169 U. S. 513, 16 S. Ct. R. 637.

The appellants have made a demand for the payment of the 1919 taxes, they have given the trustee the amount, and he has the terms of the lease before him because he has had the court authorize the monthly payment of rent, but the appellants have been poorly advised as to the duty of the trustee to pay this item. They have at most made a mistake of law.

In *Hutchinson v. Otis*, 115 Fed. 937, later approved in the supreme court, it was said:

“Therefore, as the record leaves the matter open, we are bound to conclude that, in all the proceedings which it is necessary for us to consider, Otis, Wilcox & Co., acted under a mistake of fact, and not a mere mistake of law, although it is settled beyond question that parties acting under a mistake of law will not necessarily be held to that mistake by a court of bankruptcy, when the result would be to do substantial injustice.”

In re Myers, 99 Fed. 691, considered the right to amend a claim filed as an unsecured claim so as to permit the claimant to offset the bankrupt's bank deposit against the indebtedness due the bank. The court said:

"The court undoubtedly possesses the power, in its discretion, and in a proper case, to allow proofs of debts to be amended, and *in case of mistake or ignorance, either of fact or law, will generally exercise that power, in the absence of fraud*, and when all the parties can be placed in the same situation that they would have been in if the error had not occurred, and where justice seems to demand that the amendment should be made. This would seem to be such a case."

The majority of the cases already cited cover situations where the creditor has mistaken not only form but procedure or rights. And they evidence a purpose of the vast majority of courts to aid the claimant where no one is harmed by his conduct and a failure to aid him will work a hardship upon him.

Even where the creditor has received a voidable preference and has refused to surrender it, the courts permit him to share in the general fund when he has lost his cause.

In re Louis J. Bergdoll Motor Co., 233 Fed. 410, the court said:

“The trustee does not assert that the mere lapse of time was sufficient. It is true that more than a year had passed since the adjudication (section 57, cl. ‘n’); but as the litigation about the preference was not ended until April 26, 1915, and as the proof was offered within 60 days from that date, he concedes that the offer was in time. . . . The sole ground of the trustee’s objection is that the preferential payment was a fraud in which Bergdoll himself took part, and that such conduct affords an equitable reason for denying him the right to prove. . . . In the last analysis we are asked to punish a creditor whose debt was lawfully contracted, for the reason that he was guilty of fraud afterwards in trying to secure an advantage. . . . Is he to be punished still further by the practical forfeiture of his debt? As it seems to us, the sufficient answer is the language of *Keppel v. Bank*, 197 U. S. 362, 25 Sup. Ct. R. 445: ‘This would disregard the elementary rule that a penalty is not to be readily implied, and on the contrary that a person or corporation is not to be subjected to a penalty unless the words of a statute plainly impose it.’ ”

In re Fagan, 140 Fed. 758.

So far as the conduct of the parties can be compared, if the appellants’ letter should be considered as a demand for a better share of the estate than other creditor might receive, still the principle of the preference cases clearly indicates that they have done nothing that can warrant the court in for-

feiting their lawful demand against the bankrupt estate.

The present case is a particularly harsh case against the appellants if the decision of the District Court is to stand because it will result in the use of the bankruptcy court to aid a corporate debtor to have returned to it assets that should be a trust fund for its creditors. The agreed facts in the record are "that there are sufficient funds on hand to pay the said petitioners the same percentage as has heretofore been paid other creditors, and that there is a possibility that all creditors will be paid one hundred cents on the dollar on their claims." (Tr. pp. 19-20.)

Where compositions have been made in the bankruptcy proceedings the courts have permitted most liberal amendment. *In re Aarons*, 243 Fed. 634, Judge Davis said:

"The court recognized this claim and had all the essentials thereof before it. The money with which to pay the same was deposited with the clerk of the court and is now in his hands. The bankrupt in effect says: 'True, I included this claim in my schedules, do not dispute its correctness, and agreed to pay 20 per cent thereof in cash, and in consequence had my estate returned to me; but the claimant did not prove his claim within one year, and there-

fore I should not be compelled to pay it, although I made no such condition in my offer.'

"This would be most inequitable. It would doubtless be better practice for the creditors to prove their claims, and to do so within one year; but as Judge Coxe in the case of *In re Basha & Sons*, 200 Fed. 951, said with reference to a creditor in a similar situation: 'Was not the bank excusable for not having filed a formal proof? We think it was, and that the court should have permitted it to be filed *nunc pro tunc*.' "

The funds are here to pay the appellants, other creditors have received large dividends and we understand that since this case was heard below, have been paid in full. The lease was not taken as an asset by the trustee so must have reverted to the bankrupt if there was any value in it, yet the appellants can not require payment of the taxes for 1919 which were clearly a claim against the estate. Such is not an equitable adjustment between the bankrupt and the appellants. Since the creditors are practically eliminated the equities between the bankrupt and the appellants are really all that should be considered.

Planters Oil Co. v. Gresham, 202 S. W. 145,
on 153.

2 Remington on Bankruptcy, concludes, section 889, on amendment of claims, as follows:

“The rule (of permitting amendments to informal claims) has been so relaxed by recent decisions that it has finally come to be held in one circuit that a failure to file within the year owing to a ‘pardonable mistake’ will warrant the allowance of a *nunc pro tunc* order, especially where it also appears that the claim was recognized by the court and the creditors as one entitled to share in composition proceedings.”

In re Coleman & Titus Corporation, 286 Fed. 303 to the same effect.

A creditor with a voidable preference is not required to file a claim within the year on the assumption that his security may be taken from him. A creditor whose claim is being liquidated by litigation does not have to commence his suit for liquidation during the year. (2 Remington on Bankruptcy, Sec. 878.) Why should a creditor who has received every indication from the trustee that he intended to assume a lease *cum onere*, be precluded from filing an amended claim where the referee refused after the year to permit the trustee to accept the lease as an asset of the estate?

In *Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. R. 799, the court refused to allow a trustee to say that he had elected to abandon property where he had done nothing to show an acceptance during the year.

The language of the decision seems applicable here:

“In this case the assignee had taken a year to wind up the estate, and had given no sign of his wish to assume this property if indeed he knew of its existence. On being asked with reference to it by the proposed purchaser, he replied that the estate was all settled up, that he had no power to do anything in the matter as that Poinier was the only one who could give title. A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the happening, it was his duty to inquire into the matter if he had any thought of accepting them, and not to mislead the plaintiff’s agent by referring him to the bankrupt as the proper person to apply.”

In the present case it is stipulated that the trustee after the year for filing claims had elapsed represented that he would pay an amount of rent which would include payment of the 1919 taxes, that the trustee did nothing to prevent the appellant from filing a claim within the year, made no affirmative representation that the 1919 taxes would be paid as a part of the expenses of administration, nor did anything to mislead claimants or influence or induce them not to file claim, nor did they refuse to pay these taxes until after the year was up. (Trans. pp. 19-20.)

The trustee took no action except as was consistent with an acceptance of the lease *cum onere*. His

answer to appellants' petition is that he did not have to move during the year for filing claims because more than that time was necessary for him to decide whether to accept or abandon the lease. (Trans. p. 8.) Why should the appellants file a claim during the year when they had been told by the trustee that he would pay a sum sufficient to include this item of tax? In fact his position has been, now that the year has elapsed and you thought that you would receive payment of your taxes, you are without legal remedy.

Under the foregoing authorities we submit that appellants should be allowed to file an amended claim.

The District Court dismissed the suggestion that the amendment could be tendered within sixty days after the order of the referee fixing the reasonable allowance for the use of the premises, as being inconsistent with the amendment of the letter as an informal claim on the estate. (Trans. p. 33.)

We feel that any inconsistency was forced upon the appellants and not of their own choosing, and, therefore, should not prejudice their right to amend. Their position was consistent up to the time the trustee by his answer repudiated his proposal to

pay an amount of rent that would include the 1919 taxes. Then appellants were confronted with a choice either to persuade the court to make an allowance of a reasonable rental large enough to cover the loss of the 1919 taxes or to seek to have the right to try out that proposition and if unsuccessful to have an amended claim filed to the letter of August 28, 1920.

The object of the proceedings before the referee was to determine whether the appellants were entitled to any redress on the state of facts developed. The proceedings included a matter clearly provable as a claim against the estate, if the trustee was not required to pay the item for other reasons. The proceedings were therefore for the purpose of liquidating, adjusting and determining what should be paid by the trustees to the appellants. If the trustee had accepted the lease as an asset of the estate, then no claim was necessary or proper. The proceedings were to determine the question of whether the appellants should look to the trustee or to the estate. Without enlarging the scope of the decisions applicable to section 57n of the Bankruptcy Act, the claim was proper.

We think that the following cases amply sustain the application of the principle to the present facts:

In re Roeber, 127 Fed. 122.

Buckingham v. Estes, 128 Fed. 584.

Bennett v. American Credit Indemnity Co.,
159 Fed. 624.

In *In re Standard Telephone & Elec. Co.*, 186 Fed.
586, the court said:

“Worcester in his Unabridged Dictionary gives the first definition of this term (liquidate) ‘To clear away, to clear or free from complication, confusion or obscurity,’ and the third definition, ‘To ascertain the kind and precise amount of as of damages or a debt.’ To remove doubt as to the kind of a claim was as much a liquidation as to determine the exact amount thereof.”

And see cases there cited.

The liquidating suit does not have to be commenced within the year for filing claims if urged in good faith.

2 Remington on Bankruptcy, Sec. 862.

We, therefore, respectfully submit that the appellants are entitled to relief on their appeal and should be permitted to file an amended claim for the 1919 taxes on the property covered by the lease.

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WM. Z. KERR,

Attorneys for the Appellants.

In The United States
Circuit Court of Appeals
For The Ninth Circuit

In the Matter of
PATTERSON-MACDONALD SHIPBUILDING COM-
PANY, a corporation,
Bankrupt.

THOS. CARSTENS and STACIE C. CARSTENS, his wife,
Appellants,

—VS.—

JOHN L. MCLEAN as Trustee in Bankruptcy of
Patterson-MacDonald Shipbuilding Company, a
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Appellee.

BRIEF OF APPELLEE

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No. 4059.

BRIEF OF APPELLEE

MOTION TO DISMISS.

The appellee moves that the appeal herein be dismissed upon the ground that this court has no jurisdiction thereof.

ARGUMENT ON MOTION TO DISMISS

The Referee certified the question for review as follows:

“Was the Referee in error in denying the

petition of Thomas Carstens and Stacie C. Carstens, his wife, for leave to file a proof of claim for the amount of the taxes for the year 1919, in view of the law and the facts touching the question at issue?"

The matter thus presented is a "proceeding in bankruptcy", as distinguished from a "controversy at law or in equity" arising in the course of bankruptcy proceedings, of which this court would have jurisdiction under Section 24 of the Bankruptcy Act. Nor does it seem that the case is appealable to this court under Section 25-a (3) of the Act, under which this appeal is apparently brought. That section applies to a judgment allowing or rejecting a debt or claim, and apparently contemplates a final decision upon the merits of such debt or claim. The merits of the claim asserted are not involved in this case at all, but only the question of the application of the limitation of Section 57-n. It is peculiarly a proceeding in bankruptcy in which the jurisdiction of this court is limited to superintendence and revision in matters of law of the proceedings of the lower court under Section 24-b of the Act.

Morehouse v. Pacific Hardware & Steele Co.,
177 Fed. 337, (C.C.A. Ninth Circuit);

In re Schaffner, 267 Federal, 977, (C.C.A.
Second Circuit);

In re Nagel, 278 Federal, 105, (C.C.A. 2nd
Circuit).

ARGUMENT UPON THE MERITS.

Both the Referee and the District Court recognized the spirit of liberality evidenced by the courts in permitting amendment of informal and defective claims, but were impelled to hold that the principle could have no application here, because no claim whatever had been filed within the year, which could be made the subject of an amendment.

The general rule is stated in Remington on Bankruptcy, 3rd Edition, as follows:

“888. AMENDMENT OF CLAIM AFTER EXPIRATION OF YEAR.—A proof of debt may be amended after the close of the year, for the amendment, like all amendments, reverts to the time of the original filing and takes effect from that time, and should in all respects be considered the same, as if it had been already filed then.”

Vol. 2, p. 284.

“889. BUT AN ORIGINAL CLAIM MUST EXIST, FILED WITHIN THE YEAR.—Of course, there must have been an original proof duly filed within the year; otherwise there would be nothing by which to amend; and the power of amendment is not to be distorted to let in dilatory creditors who have filed no proof within the limited year.”

Vol. 2, p. 286.

And in Collier on Bankruptcy, 11th Ed., it is said:

“But an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed. There must be before

the court the substance of a claim in some form, filed or presented within the proper time; whether formal or informal, a claim must show that a demand is made against the estate, and must show the creditor's intention to hold the estate liable."

Page 794.

The several cases cited by appellants in which amendments were permitted after the expiration of the year, support and illustrate the general rule as above stated, but they do not enlarge it. An examination of such cases will disclose that where the amended claim was allowed to be filed, it was based on a substantial claim filed against the estate within the year, as provided by Section 57-n.

In the quotation from *Hutchinson v. Otis*, 115 Fed. 937 (Appellants' Brief, p. 9) a clerical error in quotation results in a serious change in meaning. It is said that the proof "failed in every substantial particular" to comply with the general orders of the Supreme Court in reference to such matters. The language of the case is that the proof failed "in very substantial particulars," to so comply. As is stated in that portion of the decision quoted at the top of page ten of appellants' brief, "there was enough in the original proof by which to amend." Furthermore, the decision in this case was also grounded upon the provision respecting the time within which claims may be proved after being liquidated by litigation.

In the decision of the Supreme Court in this same

case it was pointed out that an original claim was filed within the year, and that the claim upon which the original proof was made was the same as that ultimately proved, and that the substituted claim was filed by consent of the trustee.

The case of *In re Patterson-MacDonald Shipbuilding Company*, 288 Federal, 546, cited on page eleven of appellant's brief, did not involve a claim against the estate of a bankrupt, governed by Section 57-n of the Act, at all, but was a matter of establishing an expense of administration.

We shall not further discuss in detail the cases cited on this proposition. An examination of them will show that where the amendment was permitted, it was upon the basis, as was said in *In re McCarty Portable Elevator Co.*, 205 Fed. 986:

“That the claim proved presents, in substance, that which the amendment seeks to make effective.”

The question here, however, is not so much one of law as of fact. At page eighteen of appellants' brief, referring to the letter of August 28th, 1920, which is now sought to be amended, it is said:

“Had it not demanded or claimed an indebtedness against the bankrupt, it might not have been amendable.”

In other words, it is admitted that if this letter was not presented as a claim against the estate of the bankrupt, with the intention of being so accepted and considered by the trustee, it cannot be treated

as the basis of amendment. What is the fact, then, in this regard?

The only thing that was done, was the mailing to the trustee of the letter of August 28th, 1920. In the first place, this letter did not purport to set forth a demand or claim of these appellants at all, but was a demand in the name of the Carstens Packing Company, a corporation by its secretary and treasurer. In the next place, it did not indicate the assertion of any claim or demand against the bankrupt's estate at all. It is clearly apparent that the signer of the letter did not intend to put himself or itself in the place of a creditor of the estate. It was a notification to the trustee directing *him* to pay, not to the appellants or to the signer of the letter even, but to the county, certain accrued taxes for the year 1919, which were due and payable before the date of bankruptcy, forthwith and in full, regardless of the percentage of distribution that might be made to other general creditors, and notifying him that if same were not paid, some action would be taken, presumably in accordance with the provisions of the lease. From the appellant's petition herein, (Tr. pp. 1-6) and from the agreed statement of facts, (Tr. p. 20) it is clear that the contention of appellants at the time of commencement of these proceedings, which was some eighteen months after the time for filing claims had expired, was that the 1919 taxes referred to in the letter of August 28th, should be paid as an expense of administration by the trustee. In other words, the

appellants themselves did not, prior to that time, undertake to assert such a claim, or consider it as a claim against the estate of the bankrupt, provable by them at the date of bankruptcy. What they were asking and demanding by that letter, and intending to assert was not a status as a creditor with a provable claim, but an immediate payment in full by the trustee as an expense of administration, of an amount claimed to be due for taxes which had accrued prior to the bankruptcy.

“The letter demands payment of the representative of the estate, and that he make the payment on the same basis as the bankrupt had paid under the lease. It most certainly evidences an intention to require the representative to make the payment.”

Appellant's brief, p. 21.

It seems quite apparent from appellants' claim and the testimony of Mr. McCord, that they never intended, until at or about the time of the hearing before the Referee, to file a claim for the 1919 taxes as a claim against the estate. They proceeded on the theory that if the trustee occupied the premises, he necessarily accepted the lease and all of the burdens thereof, and would have to pay, as an expense of administration, prior to dividends to general creditors, any indebtedness that had accrued under the lease at the time of bankruptcy.

They claimed payment of these taxes from the trustee as a part of the compensation due from him on account of his occupancy of the premises. Such

compensation was, after a hearing, fixed by the Referee upon a basis with which the appellants are satisfied, and which they have accepted without appeal. (App. Br. p. 4). Any claim to such taxes as a part of the consideration of the trustee's occupancy therefor, has been comprehended in that judgment and satisfied by appellants' acceptance thereof.

Both the Referee and the District Judge found that the appellants did not by such letter intend to present a claim as creditors of the estate of the bankrupt to be allowed and paid as other claims of the same class, but that on the contrary, the manifest purpose thereof was to require the payment of taxes in full by the trustee, and as the District Judge said, "the intimation follows that the penalty or default for violation of the conditions of the lease would be invoked."

It is this matter of the purpose and intent of the appellants in presenting this letter, if it be considered as their act, which is the controlling and decisive factor in this case, and the Referee, who heard the witnesses, and the District Judge, having found not only an absence of such intent, but a positive and contrary purpose inconsistent with a claim against the estate, such finding should not now be disturbed, particularly where there is no evidence to the contrary.

The letter is wholly and completely insufficient as a proof of claim under Section 57-a of the Bankruptcy Act and General Order 21. None of the

authorities cited by appellants go so far as to permit of the filing of the claim as an amendment under such circumstances. A case very similar in point of fact, and in some respects much stronger than the present one, is that of *In re Thompson*, in which the decision of the District Court is reported in 222 Federal, 167, and the decision of the Circuit Court of Appeals affirming the same, in 227 Federal, 981. In that case it was held that a letter by the creditor, a bank, setting forth the amount of its notes against the bankrupt, but not asserting them as a claim against the estate or indicating that the letter was to be considered as such, was not a sufficient claim upon which an amendment could be made. The court said (227 Fed. at p. 983) :

“Much liberality has been shown by the courts in permitting imperfect claims and proof of claims to be put into proper form after the statutory period has expired, but we are advised of no decision that runs counter to the positive language of the act, and permits a claim that is wholly new, to be presented after the limitation has run. In some form, the substance of the claim must have been made within the proper time, but if this has been done, amendment may be made afterwards. Whether formal or informal, a claim must show (as the word itself implies) that a demand is made against the estate, and must show the creditor’s intention to hold the estate liable.”

The District Court, in passing upon the same case, said:

“There is nothing in the bank’s letter from which it can be inferred that it intended thereby to file a claim against the estate. Neither of the bank’s officials who testified in this matter stated that such was the intention. There was no direction that such letter should be filed as a claim, and it was not so filed. To my mind, the rule declared in *Re McCallum & McCallum* (D.C.E. Dist. Pa.) 127 Fed. 768, is controlling. In that case Judge McPherson, at page 769, said:

‘With every disposition to be liberal in the allowance of amendments, there is nevertheless a limit to the power of the court in this regard. If the year within which claims may be proved is still unexpired, amendments are largely a matter of course; but after the expiration of the year a different situation is presented. The rights of creditors are then fixed by the act itself, and no new right can be introduced. If the proof of a right that had already been asserted in substance should thereafter be found to lack form or precision, ordinarily, I suppose, such defect might still be remedied; but, as Judge Archbald said in a similar case (his opinion was afterward adopted by the Circuit Court of Appeals): “The general right to amend, regardless of the time which has elapsed, is

abundantly sustained by the authorities * * *. But to do so, it is plain, there must be in the record, as it stands, the substance of that which is asked for. The right to amend can go no further than to bring forward and make effective that which in some shape is already there." *In re Mercur* (D.C.) 116 Fed. 655; *Id.*, on appeal 122 Fed. 384, 58 C.C.A. 472.' "

At pages 29 and 37 of their brief, appellants suggest that they were induced not to file a claim against the estate within the year by the representation of the trustee that he would pay the 1919 taxes. But the agreed statement of facts shows that it was not until April of 1921, after the year for proving claims had expired, that any representations were made by the trustee regarding the payment of such taxes, and that then no agreement was executed by authority of the court, and that during the year for filing claims, the trustee made no representation that the said taxes would be paid as a part of the expense of administration, nor did anything to mislead claimants, or influence or induce them not to file their claim. The appellants were not misled or prejudiced by any act of the trustee or the Referee, as was the case in *Bennett v. American Credit Indemnity Co.*, 159 Fed. 624, (App. Br. p. 22) and *In re Kessler*, 184 Fed. 51, (App. Br. p. 22).

Nor does the appellee admit what seems to have been considered as an important factor in some of

the cases, that the claim herein asserted is for a debt justly due and owing to appellants. On the contrary, the appellee will, if called upon to do so, resist and deny the claim, partly because it comprehends local improvement assessment items which are not properly taxes, and also because the estate is entitled to credit for a deposit made as security on the lease, and for overpayments, by mistake, of local improvement assessments which were thought to be taxes. We wish also at this point to challenge the statement made on page 34 of appellant's brief, that the creditors have received large dividends and since the case was heard below, have been paid in full, neither of which statements is correct, nor supported in any wise by the record herein.

Appellants also contend that they are in time with this claim, as an original filing, under the provisions of Section 57-n of the Act, respecting proof of claims liquidated by litigation. Such a theory is wholly inconsistent with, and must be construed as an abandonment of the contention that the claim now offered is an amendment of a claim contained in the letter of August 28th, 1920. If the claim is now sought to be filed as an amendment, based upon the letter of August 28th, 1920, it is unaffected by litigation. On the other hand, if it is claimed to be filed as an original under extension of time resulting from liquidation by litigation, it can derive no support from the theory of an amendment.

In any event, the theory is unsound. The litiga-

tion with the trustee was concerned with the question of whether or not he had accepted the lease and was bound to pay the full rental fixed by it after he took possession, or was responsible to appellants only for reasonable compensation during the period of his occupancy. There was no connection between this litigation over the rental due as an expense of administration, and the claim of the appellants as general creditors, for rental or taxes due prior to the bankruptcy.

As to those items, petitioners were limited to their claim against the estate.

In re Sherwood, 210 Fed. 754 (C.C.A. 2nd Cir.) ;

In re Mullings Clothing Co., 230 Fed. 681 (D. C. Conn.).

The liquidation proceedings referred to in Section 57-n of the Bankruptcy Act, relate to claims against the estate, and not to the settlement of amounts due from the trustee as expense of administration. The limitation provisions of that section have no application to claims against the trustee for expense of administration.

In re Greene, 231 Fed. 253. (D. C. Pa.)

The litigation between the trustee and appellants was not of the character, nor did it concern the subject matter of the claim now sought to be filed, so as to extend the time for filing such claim.

See

In re E. O. Thompson & Sons, 123 Fed. 174, (D. C. Pa.) ;

Moore v. Sims, 257 Fed. 540. (C.C.A. 6th Cir.).

Moreover, there was nothing unliquidated about the subject matter of this claim, making applicable the theory of an extension of time on account of liquidation proceedings under Section 57-n of the Act.

In their original petition, the appellants did not assert any right to file a general claim for such taxes, but endeavored to collect them in full from the trustee. It was only when they found that they could not succeed in this effort, that they, by their reply, set up the letter of August 28th, 1920, and asked permission to file an amended claim based thereon. Up until that time they had never given the slightest intimation that they considered themselves general creditors of the estate in the amount of such taxes. The petition against the trustee was not filed until October 2nd, 1922, whereas the year for filing claims expired March 21, 1921. If the mere assertion of an unfounded claim against the trustee should be held sufficient to excuse the failure to file it as a general claim against the estate, the limitations of the Act would be largely nullified.

We respectfully submit that the action of the Referee and the District Judge was right, and should be confirmed.

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J. S. ROBINSON,

H. B. JONES,

Attorneys for Appellee.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

In the Matter of PATTERSON-MacDONALD
SHIPBUILDING COMPANY, a corporation,
Bankrupt

THOMAS CARSTENS and STACIE C. CAR-
STENS, his wife, *Appellants*
vs.

JOHN L. McLEAN, as Trustee in Bankruptcy
of PATTERSON-MacDONALD SHIPBUILD-
ING COMPANY, a corporation, Bankrupt,
Appellee

REPLY BRIEF OF APPELLANTS

KERR, McCORD & IVEY
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1309 Hoge Building, Seattle, Washington

In the
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Appellee

REPLY BRIEF OF APPELLANTS

MOTION TO DISMISS APPEAL

The present appeal is from an order which re-
jects a debt or claim of over \$500 within meaning
of section 25a, Bankruptcy Act of 1898, as amend-
ed. The cases cited by appellee are not in point.
The only decision squarely in point that we have

been able to find is a recent case of *In re J. Menist Co.*, 289 Fed. 229. This is a decision of the Circuit Court of Appeals of the Second Circuit later than two cases cited by appellee on page 4 of his brief of the same circuit. In this case the National Surety Company failed to file its claim within the year allowed for filing claims and the claim "was not accepted on the ground that it was not filed in time. The Surety Company thereupon applied to the district for permission to file its claim and its application was denied. It then petitioned to revise and also appealed." The petitioner attempted to evade section 57n of the Bankruptcy Act by seeking to be subrogated to a claim of the United States government. Judge Rogers said:

"Before we proceed to a consideration of that question (the right of subrogation) we find it necessary to say that as the case has been brought here by petition to revise and appeal we must dismiss the petition to revise. Under Bankruptcy Act, section 25a an appeal is the proper method to bring here a judgment rejecting a claim. The petition to revise must therefore be dismissed as improperly brought. In dismissing it we can not refrain from condemning the practice of bringing both the petition to revise and an appeal in a case like this in respect of which there can be no possible doubt as to the proper remedy under the act. There are, of course, doubtful cases in which counsel may be

justified in resorting to both methods of bringing a case into this court leaving it to the court to determine which of the two methods was the one the act required to be used but this case is not of that class and there can be no excuse for the loose and careless practice of resorting to both remedies where it is perfectly plain which method under the act is the one which the party must employ.”

Practically all of the cases where the Circuit Courts have considered the propriety of filing amended claims the matter has been brought to the Circuit Court by appeal and no question has been made of the propriety of the practice.

In re Kessler, 184 Fed. 51.

Bennett v. American Indemnity Co., 159 Fed. 624.

In re Jones Dry Goods Co., 223 Fed. 318.

In re Central Grain Co., 200 Fed. 229 (Ninth Circuit).

In re Ellis, 252 Fed. 483.

In the present case the facts are stipulated by the parties and are not in dispute so that in any event there is nothing but a question of law involved. If appellants have been in error in relying upon appeal alone, the court should consider the appeal as a petition to revise.

In re Williams Estate, 156 Fed. 934 (Ninth Circuit).

In re Russell, 247 Fed. 95.

Collier Bankruptcy, (12th ed.) p. 579.

The Circuit Court of the second circuit has recently even permitted the construction of an erroneous appeal as a petition to revise.

In re Rasmussen, 287 Fed. 860.

ARGUMENT ON MERITS

Argument of respondent seems to resolve itself into the proposition that appellants' letter of August 28, 1920, was not intended to be filed as a claim. The only authorities cited to support this proposition are *In re Thompson*, 223 Fed. 167; *In re McCallum*, 127 Fed. 768 and *In re Mercur*, 122 Fed. 384.

In re Mercur does not appear to involve an amendment to a claim.

In re McCallum a claim was made on one note. Attempt was made to amend this claim by adding an entirely new indebtedness on another note. The amended claim in the present instance is the identical debt claimed in the letter of August 28th.

In re Thompson does not hold that it is necessary that the letter sent to the trustee had to be sent with intention that it be filed as a claim but simply holds that the letter must evidence an intention to hold the estate liable. As pointed out in our opening brief, page 21 *seq.*, the letter of August 28th sufficiently evidences an intention to assert a demand against the estate irrespective of the purpose of the appellants in addressing the letter to the trustees.

On pages 13 and 14 of appellee's brief, they suggest that in the cases relied on by the appellants, it was admitted that the claims were justly due. They suggest that the 1919 taxes in the present case, includes a

- (a) Local assessment,
- (b) That the trustee should have a credit for a deposit made as security on the lease, and
- (c) A credit for an overpayment by mistake for local improvement assessments for 1917 and 1918.

The portion of the 1919 tax for commercial waterway assessment (paragraph 3, Original Petition, Trans. p. 3), collectible under section 9754, Remington's Compiled Statutes, 1922, is made a

part of the general taxes so as to require the lessee to pay the assessments under the terms of the lease providing that the lessee should pay "the annual taxes on the property." In part the section provides:

"All assessments shall be levied from time to time by the Board of Commissioners by written notice to be addressed to and served on the County Assessor of the county, which notice shall be so served on the County Assessor on or before the first day of November of each year, or as soon thereafter as practicable, and such assessments shall be levied against and apportioned to the lands in such district benefited by said improvements in proportion to the maximum benefits originally determined by the judgment of the court and such assessments shall fall due during the then ensuing calendar year at the time of the falling due of general taxes, and the amount so designated shall be added by the county assessor to the general taxes of each person or corporation, and to the general taxes against each lot or tract of land or other property, according to such notice, and the several amounts thereof shall be placed upon the general tax-rolls in the office of the county assessor and shall be deemed for all purposes a part of the general taxes, and shall constitute liens against each such lot or tract of land of equal rank with state, county and city taxes and shall have the same priority over all other liens as state, county and city taxes have, and shall be subject to the same interest and penalties in case of delinquency, certificates of delinquency foreclosure or other pro-

ceedings leading up to final payment, enforcement and collection, such assessments shall be deemed a part of the general taxes as aforesaid."

In view of the statute it seems to us that the provision in the lease requiring payment of the annual taxes would clearly require the payment of a portion of the taxes made up by the waterway assessment.

The record is silent as to any deposit having been made for security of performance of the lease by the tenant but the trustee has refused to accept the lease as an asset of the estate and the lease therefore still belongs to the bankrupt.

It would certainly be a strange situation that would permit the trustee to take from the creditor a security held for performance of the contract and permit the bankrupt to continue to hold the creditors' land as a tenant.

The trustee can hardly claim that the waterway assessment paid by the bankrupt in 1917 and 1918 could be credited against the taxes, since, as we have pointed out, the assessment is for "all purposes" to be considered a part of the general taxes. The fact that the tenant paid the taxes during those two years is evidence of a construction

of the contract in accordance with the provision of the statute.

We therefore insist that there is not even a *prima facie* showing that the claim of the appellants is not justly due and owing.

RIGHT TO AMEND SIXTY DAYS AFTER LIQUIDATION
OF CLAIM

The first three cases cited by the appellant on page 39 of their brief are erroneous citations and do not involve section 57n of the act. In lieu thereof we would cite *In re Salvator Brewing Co.*, 193 Fed. 989; *In re Faulkner*, 161 Fed. 900.

We also apologize for the erroneous quotation from the *Otis* case on page 9 of our brief.

We respectfully submit that the appellants are entitled to redress on this appeal.

KERR, McCORD & IVEY,
WM. Z. KERR,
Attorneys for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF KETCHIKAN, a Municipal Corporation,
Appellant,

vs.

MARY M. FURNIVALL,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

FILED

SEP 5 - 1923

R. D. BRONKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF KETCHIKAN, a Municipal Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan, Alaska.

Filed in the District Court, District of Alaska.
May 20, 1922. Jno. H. Dunn. By A. W. Fox,
Deputy.

MARY A. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

Objection.

To the Honorable Thos. M. Reed, District Judge:

Comes now Mary A. Furnivall, and for her objection to the application of the City of Ketchikan to have this Court make an order of adjustment and sale of her property mentioned and described in the Delinquent Tax Roll, which is set for hearing before this Court on May 20, 1922, says:

I.

That at all times mentioned in this objection and in the said Delinquent Tax Roll, this objector was

and now is the owner of a possessory right in and possession of those certain unpatented lands mentioned in said Delinquent Tax Roll and therein described under the head of Delinquent Improvement Assessments, as follows: the paramount title thereto belonging to and being in the United States:

HARRIS STREET EXTENSION.

Furnivall, F. J. 92.68 feet (Lot 11, Block E, S. Addn.) Jan. 1, 1922. \$353.10. \$11.06. \$364.16.

Furnivall, F. J. 79.79 feet (Lots 1 & 3, S. Addn.) Jan. 1, 1922. \$304.00. \$9.53. \$313.53.

That the said F. J. Furnivall was not at any of the times mentioned herein, or in said Delinquent Tax Roll, or in the proceedings before the City Council of Ketchikan, in relation to the improvement of said Harris Street Extension, the owner of said tracts of land, or any part thereof, nor had he any interest therein, except the said F. J. Furnivall was at all times and now is the husband [1*] of said Mary A. Furnivall.

II.

That at all the times mentioned in this objection and in the said Delinquent Tax Roll, and in the proceedings before its City Council in relation to the extension of the said Harris Street upon which the claim of tax herein is made by said City of Ketchikan against the said property, the City of Ketchikan was an incorporated town or city, within the Territory of Alaska, and this objector was the owner of said tracts of land therein, which said

*Page-number appearing at foot of page of original certified Transcript of Record.

tract of lands were now and are abutting upon the street therein known herein and in said proceedings as Harris Street Extension.

III.

That on September 7, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan, aforesaid, a petition in writing asking for the construction of an extension of the said Harris Street, at the expense of the property owners thereon, and the City of Ketchikan; that a full, true and correct copy of the said petition is attached to this objection, and marked Exhibit "A" and made a part of this objection.

IV.

That on October 5, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan, aforesaid, a petition in writing asking for the construction of an extension of the said Harris Street at the expense of the property owners thereon, and the City of Ketchikan; that a full, true and correct copy of the said petition is attached to this objection and marked Exhibit "B," and made a part hereof; that the last mentioned petition was ordered approved and filed October 5, 1920, by the said City Council of [2] of said City of Ketchikan, and the same was so approved and filed in its records.

V.

That at a regular meeting of the said City Council of Ketchikan, held in the council rooms of said Council, in said Ketchikan, on the second day of

February, 1921, the said City Council took the following action and thereby adopted the following resolution, to wit:

“Ketchikan, Alaska, February 2, 1921.

A regular meeting of the City Council of the City of Ketchikan was held on the above date. Present were Mayor D. W. Hunt, Councilmen John A. Anderson, Geo. Morrison, Wm. Anderson, G. E. Paup, Ed. J. Williams, and H. Nixon. The minutes of the previous meeting were read and approved.”

* * * * *

(Sundry proceedings and then the following):

“A motion was duly and regularly made and carried that the following Resolution be adopted and the same was adopted on call vote of Council as follows: Councilmen: John A. Anderson, Geo. Morrison, Wm. Anderson, G. E. Paup, Ed. J. Williams and H. Nixon all voting Aye and the Mayor declared the same adopted.

RESOLUTION.

Be it resolved by the Common Council of the City of Ketchikan, Alaska:

That the several sums set after the names of certain persons and the real property owned or occupied by them under possessory rights or otherwise which property abuts on the Harris Street Extension in the City of Ketchikan, Alaska, be and the said sums are hereby assessed against said persons and said land owned or occupied by them as aforesaid for two-thirds ($\frac{2}{3}$) of the expense of the construction of said street, the numbers of feet of prop-

erty abutting upon said improvement is hereinafter more fully set forth.

M. H. Smith, Jr.,.....	57	Ft. Frontage	\$221.27
Mrs. Orin Hill,,.....	51	“ “	197.98
C. V. Trill,.....	113	“ “	438.67
C. A. Smith,.....	96	“ “	372.67
F. J. Furnivall,.....	58	“ “	225.16
J. Peterson,.....	68	“ “	263.98
F. J. Furnivall,... ..	78	“ “	302.80
Ed. Horton,.....	32	“ “	124.22
P. Ziller,.....	45	“ “	174.66
John Koel,.....	70	“ “	271.74
Dr. B. P. Dickinson,...	102	“ “	395.96
Wm. Boos,.....	41	“ “	159.16
R. E. McGlashan,.....	36	“ “	139.75
Mrs. G. C. Clark,.....	13	“ “	50.47

Be it further resolved: That the foregoing sums as assessed against said persons and said lands abutting thereon as above [3] *wet* forth be and the same are hereby made a specific lien upon said land; and such assessments shall be due and payable to the City Treasurer of the City of Ketchikan within ten (10) days from the date hereof, and shall bear interest thereafter at the rate of eight (8) per cent per annum and that if the same shall not be paid within thirty (30) days after the date hereof for failure to pay such assessments a penalty of fifteen (15) per cent of such assessment shall be *be* imposed and the whole sum of assessment and penalty shall thereafter bear interest at the rate of eight (8) per cent per annum until paid, which penalty and interest shall also be a lien upon the

property as hereinafter described and abutting on said improvement. And the collection of such assessments and the penalty and interest may be enforced by suit or collected in the same manner as other delinquent taxes.

Adopted and approved this 2d day of February, 1921.

GEO. MORRISON,

Mayor *pro tem.*

Attest:

WILL H. WINSTON,

City Clerk.

A motion was thereupon duly and regularly made and carried that the meeting adjourn.

GEO. MORRISON,

Mayor *pro tem.*''

Attest:

WILL H. WINSTON,

City Clerk.

(The foregoing record and resolution on pages 12-14 of the Minutes of the meeting of the City Council of Ketchikan, Alaska.)

VI.

That after the adoption of the resolution set out in paragraph V aforesaid, and on October 20, 1920, the city of Ketchikan entered into a contract with one Houck for the construction of a street of a narrow width along what is known as Harris Street Extension, in said Ketchikan, and between said October 20, 1920, and January 12, 1921, the said Houck constructed the said street under the said contract, and was paid by the City of Ketchikan

therefor in the full sum of \$4,958.80, the last payment thereon being on said January 12, 1921.

VII.

That immediately after the adoption of the said resolution by said City Council on said February 2, 1921, the objector herein, Mary A. Furnivall, and other owners of property abutting on the said Harris Street Extension, and on March [4] 2, 1921, made, signed and filed with the City Council of said City of Ketchikan, a protest in writing against the assessment so levied in said resolution of February 2, 1921, a full, true and correct copy of which is as follows:

“Ketchikan, 3/2/21.

The Mayor and Common Council of Ketchikan:

We, the undersigned occupiers and residents abutting what is locally known as “Shoenbar Tram,” protest against the assessment levied Feby. 2, '21, for street improvements for several reasons, amongst which are the following, viz.:

1st. That all the abutting owners have not been assessed.

2d. That the petition under which the work was carried out had not the support of sufficient interest.

(Signed) J. M. PETERSON,
R. E. McGLASHEN,
H. A. HOGEVIG,
W. P. BOOS,
MARY A. FURNIVALL,
BEATRICE P. DICKINSON.”

That said protest was laid on the table by the said City Council at its regular meeting on said March 2, 1921, and the objection of said signers treated for naught.

VIII.

That no petition or request or other authority had ever at any time or place been presented to the said City Council of Ketchikan, aforesaid, signed or endorsed by a majority of the property owners on or along so much of said Harris Street Extension as was by said City of Ketchikan so improved by the construction of a street thereon, prior to or since the beginning or completion of said improvement, or at all, and that all the persons together so signing said or any other petition or petitions asking for the construction of said improvement did not contain the names of a majority of the said property owners on both sides of said street so improved, either in front footage or in value, and the action of said City Council in so contracting to do said improvement by said Houck contract was wholly gratuitous, and not sufficient in law or in equity to create any lien upon the property of this objector, Mary A. Furnivall; that this objector did not sign [5] any of said petitions, or any petition, or otherwise request the said City Council, or the City of Ketchikan, or any of its officials, or the said contractor Houck, to do said work, or agree to pay for the same or any part thereof, but protested against the same as aforesaid.

IX.

That the Ketchikan Consolidated Mines Company,

a corporation organized under the laws of the State of Maine, was at all the times heretofore mentioned herein the owners of a tract of land abutting upon and along the south side of Harris Street Extension and upon the said street and improvement so constructed thereon as herein fully described by the said City of Ketchikan and its frontage on said improvements was equal to about one-half the whole length on said south side of said improvement; that its said property so abutted on and along said south side of the said south side of said Harris Street Extension said one-half the whole distance and its proportion of the whole cost was equal to about one-quarter of the whole; but that the City Council of Ketchikan as aforesaid did not in the resolution aforesaid so made and adopted by it on said February 2, 1921, or at any time or at all, by any resolution or any other proceeding, assess any part of the cost of said improvement of said Harris Street Extension, aforesaid, upon or charge the property of the said Mines Company, on and along the south side of said Harris Street Extension, with any part of the cost of said improvement thereon, but wrongfully and without authority or law assessed the whole of the cost of said improvement upon the property and tracts of land belonging to this objector and the other owners of property abutting upon the north side of said Harris Street Extension, thus charging the [6] property of this objector and other owners upon said north side of said improvement with the

assessment of the said Mines Company, to the injury of this objector.

X.

That thereafter and seeking further to injure this objector and other property owners on the north side of said Harris Street Extension, the City Council of Ketchikan, aforesaid, agreed with the said Mines Company to accept a deed from said Mines Company of a narrow strip of land along the south side of said Harris Street Extension, and thereby make the City of Ketchikan the owner thereof, thinking thereby to relieve the said Mines Company from any obligation to pay its proportion of said street assessment on said Harris Street Extension, and on the 30th day of November, 1921, the said Mines Company, made, signed and delivered to the said City of Ketchikan a deed of dedication of said strip of land for the purpose of a public road, and being a mere widening of said Harris Street, along the length of said extension and improvement, a copy of which deed is hereto attached and made a part of this objection; that said strip of land was of no value, and the deed thereto was a fraud upon this objector, and so made to cure the supposed defect in the wrongful assessment as aforesaid; that a copy of said deed is hereto attached, marked Exhibit "C."

XI.

That after the making and recording of said deed from said Mines Company to the City of Ketchikan on said November 3, 1921, and at a regular meeting of the City Council of Ketchikan, aforesaid, on Jan-

uary 4, 1922, the City Council accepted said deed from said Mines Company, and ordered it to be recorded by the City Clerk, which was done according to order.

XII.

That after receiving from the said Mines Company the said deed [7] of November 3, 1921, and on December 21, 1921, the City Council of Ketchikan, aforesaid, with the purpose of injuring the property owners so abutting on said Harris Street Extension, on and in front of said improvement, and immediately across said street north of said strip of land so deeded to the City of Ketchikan by said Mines Company, by its deed of November 3, 1921, repealed and set aside its resolution, as aforesaid, so made by it on February 2, 1921, and adopted a new and a different resolution in the following words and figures, to wit:

“Ketchikan, Alaska, December 21, 1921.

A regular meeting of the Common Council of the City of Ketchikan was held on the above date at 7:00 P. M. Present were Mayor Thomas Torry, Councilmen: John A. Anderson, Geo. Morrison, Axel Osberg, Walter Thomas, Thomas Davies, and W. A. Bryant. The minutes of the previous meeting were read and approved.”

* * * * *

“A motion was duly and regularly made and carried that a new resolution amending the former resolution making assessments on Harris Street be drafted and the City Clerk give the delinquents notice in writing that unless their assessments are

paid within 10 days suit will be instituted in the District Court and the City Clerk was instructed to bring said action.

Thereupon the following resolution was read:

RESOLUTION.

Be it Resolved by the Common Council of the City of Ketchikan, Alaska; That, Whereas a *recjeck* has been made of assessments levied against the property owners fronting on Harris Street in said city, and whereas such recheck has been made in accordance with established property lines fronting on said street; it is therefore hereby Resolved by the Common Council that the Resolution heretofore made on the 2d day of February, 1921, be and the same is hereby repealed and set aside, said resolution levying assessments against the property owners and property abutting on Harris Street.

And it is hereby Resolved:

That the several sums set after the names of certain persons and the real property owner or occupied by them under possessory rights or otherwise, which property abuts on the Harris Street Extension in the City of Ketchikan, Alaska, be and the said sums are hereby assessed against said persons and said land owned or occupied by them as aforesaid, for two-thirds ($\frac{2}{3}$) of the expense of the construction of said street, the number of front feet of property abutting upon said improvement is hereinafter more fully set forth. [8]

M. H. Smith, Jr.,.....	47.73	Ft. Frontage	\$181.90
Mrs. O. F. Hill,.....	50.	“ “	190.50
C. V. Trill,.....	113.18	“ “	431.20
C. A. Smith,.....	87.	“ “	331.50
F. J. Furnivall,.....	92.68	“ “	353.10
J. M. Peterson,.....	34.	“ “	129.50
F. J. Furnivall,.....	42.	“ “	160.00
F. J. Furnivall,.....	37.79	“ “	144.00
Ed. Horton,.....	34.05	“ “	129.70
P. M. Ziller,.....	61.90	“ “	235.80
John Koel,.....	25.	“ “	95.20
John Koel,.....	51.08	“ “	194.60
Dr. B. P. Dickinson,..	93.34	“ “	355.60
Wm. Boos,.....	41.	“ “	156.20
R. E. McGlashen,....	34.97	“ “	133.20
Mrs. G. C. Clark,....	21.51	“ “	82.00

(H. J. Hagevig.)

Be it further Resolved: That the foregoing sums so assessed against said persons and said land abutting thereon as above set forth be and the same are hereby made a specific lien upon said land; and such assessments shall become due and payable to the City Treasurer of the City of Ketchikan immediately upon the adoption and approval hereof and from and after January 1, 1922, the same shall bear interest at the rate of 8% per annum; said interest shall be a lien on said property abutting on said improvement. And the collection of such assessments may be enforced by suit or collected in the same manner as other delinquent taxes.

It is further resolved that all payments made on

the former assessment-roll shall be applied towards the payment of the above assessments.

Adopted and approved this 21st day of December, 1921.

THOMAS THORRY,
Mayor.

Attest:

WILL H. WINSTON,
City Clerk.

Upon a third reading thereof the same was adopted and was approved by the Mayor as witnessed by his signature above set forth and the vote of the Council upon the same was by call vote as follows:

Councilmen: John A. Anderson, Aye. Walter Thomas, Aye. Geo. Morrison, Aye. Thomas Davies, Aye. Axel Osberg, Aye. W. A. Bryant, Aye.

* * * * *

A motion was duly and regularly made and carried that the meeting adjourn.

THOMAS TORRY,
Mayor."

Attest:

WILL H. WINSTON,
City Clerk.

(Copies from pages 45, 46, Minutes of the Meetings of the Common Council of Ketchikan, Alaska.)

XIII.

That subsequent to adopting the said Resolution of December 21, 1921, the said City of Ketchikan caused its officials to prepare and present to this Court, and file herein for such action as [9] the

Court may take, that certain document marked "Notice of Delinquent Taxes, Sewer and Street Improvements. Assessments on Real Property in the City of Ketchikan," a copy of which is printed in the "Ketchikan Chronicle" by said City of Ketchikan, is hereto attached and marked Exhibit "—" and made a part hereof; that by reason of its action in that regard the said City of Ketchikan has thereby created a cloud upon this objector's title to the said tracts of land therein described as belonging to said F. J. Furnivall, but which belong instead to this objector at all times herein mentioned, and now, to her great damage.

XIV.

That objector says that all of said assessments and proceedings of the said city of Ketchikan, and its said officials, in attempting to create a lien upon said land belonging to this objector for the recovery by it of the sums so claimed by it against this objector are void, and in violation of law.

XV.

That at all the times in this objection mentioned and now the said tracts of land upon which the delinquent assessments are claimed by the City of Ketchikan from this objector and which tracts were at all such times owned and possessed by this objector, were and now are unpatented lands, the paramount title to which was in the United States, but the equitable and possessory title was and is in this objector, and that at all such times this objector had and owned upon each said tract

houses or other improvements which were and are so owned by her, and she was at all such times and now is in peaceable, undisturbed and quiet possession and the owner thereof as against all other persons.

WHEREFORE, objector prays this Court to grant an order in her [10] favor that said delinquent tax assessment so claimed by the City of Ketchikan thereby be held void and of no effect, and that such proceeding be dismissed in favor of this objector and that the lien so claimed by said City of Ketchikan against this objector's said property be declared void and held for naught, and that objector have her costs in this case against said City of Ketchikan, and such other and further relief as objector is entitled to receive.

JAMES WICKERSHAM,

Attorney for Objector, Mary A. Furnivall.

Territory of Alaska,

City of Ketchikan,—ss.

James Wickersham, being first duly sworn, deposes and says that he is the attorney for the objector, Mary A. Furnivall, hereinbefore mentioned; that he has read the foregoing objections, knows the contents thereof, and believes the facts stated therein to be true; that this verification is made by this affiant because the said Mary A. Furnivall is not within the Territory of Alaska, and cannot therefore verify the same.

JAMES WICKERSHAM.

Subscribed and sworn to before me this 20th day of May, 1922.

[Notarial Seal]

A. H. ZIEGLER,

Notary Public in and for Alaska.

My Commission expires July 15, 1925. [11]

Exhibit "A."

Ketchikan, Alaska, Sept. 7, 1920.

To the Common Council,

Ketchikan, Alaska.

We, the undersigned, property owners along the Right of Way and public thoroughfare following the course of and upon which is located the tramway belonging to the Ketchikan Consolidated Mines Company and locally known as the Schoenbar Tram, do herewith respectively petition your honorable body to proceed at the earliest opportunity to erect, construct and maintain a temporary street for vehicle passage; said street to be 18 feet in width with a four foot sidewalk. We herewith agree to pay our respective *pro rata* of the expense of same.

Mrs. O. F. HILL.

C. A. SMITH.

ED. M. HORTON.

M. H. SMITH, Jr.

C. V. TRILL.

R. A. BARTHOLOMEW.

M. H. SMITH, Sr.

WM. P. BOOS,

By Mrs. WM. P. BOOS.

J. M. PETERSON.

JOHN KOEL. [12]

Exhibit "B."

To the Honorable Mayor and Common Council of
the City of Ketchikan, Alaska.

We, the undersigned, constituting more than two-thirds in value of the property of the property owners whose property abuts upon the proposed improvement, hereby petition your Honorable Body to construct a sixteen foot plank roadway and a four foot sidewalk and to lay out, establish and a forty foot right of way, from the present Harris Street, in front of the Parker house to and past the Harry Smith house, or to the city limits. And we hereby agree to pay to the City of Ketchikan our proportionate share of two-thirds ($\frac{2}{3}$) of the cost of such improvement, and that such sum be a specific lien upon our *respective property abutting on said improvement*.

Name.	Description of Property.	No.	ft.
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C. V. TRILL,

C. A. SMITH.

LOTTIE C. HILL.

M. H. SMITH, Jr.

JOHN KOEL.

Mrs. W. P. BOOS.

By Mrs. W. P. BOOS.

E. M. HORTON.

P. M. ZILLER, by

W. F. STIVEN,

Atty. in Fact.

Ordered approved and filed Oct. 5, 1920.

WILL H. WINSTON,

City Clerk. [13]

Exhibit "C."

THIS INDENTURE, made this 3d day of November, 1921, by and between the Ketchikan Consolidated Mines Co., a corporation, organized under the laws of the State of Maine, appearing by Chas. H. Cosgrove, its duly authorized attorney in fact, first party, and the City of Ketchikan, a municipal corporation of the Territory of Alaska, second party;

WITNESSETH: That in consideration of One (\$1.00) Dollar and other valuable considerations paid to said first party by said second party, receipt whereof is hereby acknowledged, said first party does herewith grant, convey and dedicate to said second party, for the purpose of a Public Road only, all of that certain strip of ground beginning at the southerly end of Harris Street, so called where the same enters the Florida Mining Claim, and continuing across said Florida Mining Claim with a width bounded by the westerly side of said street, as platted by Joseph Ulmer, C. E., on the one side and the middle of Ketchikan Creek on the easterly side.

IN WITNESS WHEREOF, the said first party has caused these presents to be executed by its attorney in fact this 3d day of November, 1921.

KETCHIKAN CONSOLIDATED MINES CO.

By CHAS. H. COSGROVE,
Attorney in Fact.

Witnesses:

WILL H. WINSTON.

J. A. CLARY.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 3d day of November, 1921, before the undersigned, a notary public for Alaska, duly commissioned and sworn, personally appeared Chas. H. Cosgrove, known to me to be the attorney in fact of the Ketchikan Consolidated Mines Co., and who acknowledged that he signed and sealed the foregoing instrument as the free act and deed of said Ketchikan Consolidated Mines Co., and he further acknowledged that he was fully authorized to execute the same.

[Notary's Seal] WILL H. WINSTON,
Notary Public in and for Alaska.

My commission expires June 16, 1925. [14]

Notice of Delinquent Taxes, Sewer and Street Improvement Assessments on Real Property in the City of Ketchikan.

To Whom It May Concern:

Notice is hereby given, that the delinquent tax-roll and delinquent sewer and street improvement assessments of real property for the City of Ketchikan, Alaska, for the years 1918, 1919, 1920, and 1921, has been completed and is now open for public inspection at the office of the City Clerk, and that the same will be presented to the District Court for the Territory of Alaska, Division No. 1, at Ketchikan on the 20th day of May, 1922, for adjustment and order of sale. The following list shows the tracts of land as shown by said delinquent roll, the amount of tax, assessments, penalty and interest thereon, and to whom assessed: [15]

DELINQUENT IMPROVEMENT ASSESSMENTS

Bawden Street Sewer					
Groelinger, A. J.	Lot 14-A, Block 13	Nov. 20, 1920	\$ 79.36	\$ 9.64	\$ 89.00
Petty, R. L.	Lots 16, & 17, Block 13	" "	186.32	22.40	208.72
Naslund, B. N.	Part Lot 1, Block 16	" "	112.67	13.56	126.23
Hendrickson, Arndt	Part Lot 2, Block 16	" "	112.67	13.56	126.23
Shelton, James	Part Lot 2, Block 16	" "	112.67	13.56	126.23
Wyekoff, J. M.	Lot Florida Mining Claim	" "	79.36	9.64	89.00
Harvey, Mrs. M.	Lot Florida Mining Claim	" "	79.36	9.64	89.00
Front Street Grading and Sewer					
Abercrombie, E.	Part Lot 57, Block 9	Jan. 29, 1921	180.73	27.11	229.70
Harris Street Extension					
Furnivall, F. J.	92.68 feet (Lot 11, Block E. S. Addn.)	Jan. 1, 1922	353.10	11.06	364.16
Furnivall, F. J.	79.79 feet (Lts 1&3, Blk 3, S. Addn.)	" "	304.00	9.53	313.53
Peterson, J.	34 feet (Lot 2, Blk 3 S. Addn.)	" "	129.50	4.07	133.57
Smith, C. A.	12 feet (Lot 4, Blk 3 S. Addn.)	" "	40.35	1.25	41.60
Horton, Ed.	34.05 feet (Lot 10, Blk E. S. Addn.)	" "	5.48	.10	5.58
Paving Intersection Dock and Main Streets					
Independent Or.	Lot 1, Block 21	Dec. 1, 1921	379.31	51.90	445.65
R. M.					
TOTAL.....			\$2154.88	\$79.01	\$2388.20
Total Real Taxes Delinquent.....				\$1786.11	
Total Improvement Assessments Delinquent.....				2388.20	
TOTAL				\$4,174.31	

I hereby certify that the above and foregoing is a true and correct roll of the delinquent taxes and delinquent street improvement assessments of the City of Ketchikan, upon real property for the years 1918, 1919, 1920, and 1921, and showing the date when said taxes, and street assessments became delinquent, and showing the total amount of such delinquent taxes and assessments, penalty and interest separately stated, and the aggregate of the whole thereof.

During the time of the publication of the foregoing notice, and up to the time of the order of sale by the Court, any person may appear and make payment to the City Treasurer on any piece or tract therein, together with the penalty and interest.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the City of Ketchikan this 17th day of February, 1922.

[Seal]

WILL H. WINSTON,

City Clerk.

Publish February 20, 27. March 6, 13, 20. [16]

In the District Court for the Territory of Alaska,
First Division, Ketchikan.

No. 537—KA.

In the Matter of THE KETCHIKAN TAX ROLL
vs.

MARY M. FURNIVALL,

Objector.

J. M. PETERSON,

Objector.

Demurrer.

Come now the above-named objectors and each of them, and demurs to the proceedings by the City of Ketchikan in the above-entitled matter, and for cause of demurrer says:

That said proceedings and the record thereof do not upon their face, or at all, state any facts sufficient to constitute any cause of action against the objectors or either of them, or sufficient to authorize this Court to declare a lien or the foreclosure thereof upon the, or any, property of objectors, or to render any judgment against them or either of them.

JAMES WICKERSHAM,
Attorney for Objectors.

Filed in the District Court, District of Alaska, First Division. June 3, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [17]

In the District Court for the Territory of Alaska,
Division No. 1, at Ketchikan.

No. 537—KA.

MARY A. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

Answer to Objections.

Comes now the City of Ketchikan, a municipal corporation herein called the defendant and for answer to the objections of Mary A. Furnivall above named, admit, deny and allege as follows:

I.

Referring to the allegations contained in paragraph I of the objections, the said City of Ketchikan, the above-named defendant, denies each and all of the allegations therein contained and the whole thereof.

II.

Referring to the allegations contained in paragraph II, the said City of Ketchikan admits the allegation that during the times mentioned it was a municipal corporation, but denies each and every other allegation therein contained.

III.

Referring to the allegations contained in paragraphs III, IV, V, VI, VII, the said defendant admits the same.

IV.

Referring to the allegations contained in paragraph VIII, said defendant denies each and every allegation contained therein save and except all of the closing part of said paragraph commencing with the word "that" in the fifth line from the bottom. [18]

V.

Referring to the allegations contained in paragraphs IX, X, XI, and XIII, the said defendant

alleges that it does not appear upon the face of said paragraphs or any of them, that any allegation contained in said paragraphs or any of them, state facts sufficient to constitute grounds or any ground for objection by the said objector to this Court making an order of adjustment and sale of lands of which the objector claims ownership as set forth in paragraph I of the objection herein.

VI.

Referring to the allegations contained in paragraph XII, the said defendant admits the alleged proceedings of the City Council of Ketchikan aforesaid as set forth but denies each and every other allegation in said paragraph contained.

VII.

Referring to the allegations contained in paragraph XIV, the said defendant denies each and every allegation therein contained and avers that said allegations state a mere conclusion of law.

VIII.

Referring to the allegations contained in paragraph XV, the said defendant denies each and every allegation in said paragraph and the whole thereof.

WHEREFORE, the said City of Ketchikan herein called "defendant" prays judgment that the objectors aforesaid take nothing by reason of her statement of objectors filed herein, that the same be dismissed, and that the said defendant City of Ketchikan aforesaid recover of and from

the said objector Mary A. Furnivall its costs and disbursements in this proceeding.

JAMES M. SHOUP,

WILL H. WINSTON,

Attorneys for Defendant. [19]

United States of America,

Territory of Alaska,—ss.

Thomas Torry being first duly sworn on oath deposes and says: I am the duly elected, qualified and acting Mayor of the City of Ketchikan, a municipal corporation, defendant in the above entitled action or proceeding, that I have read the foregoing answer, know the contents thereof and believe the same to be true.

THOMAS TORRY.

Subscribed and sworn to before me this 26th day of May, 1922.

[Notarial Seal]

WILL H. WINSTON,

Notary Public for Alaska.

My Commission expires June 16, 1925.

Filed in the District Court, District of Alaska, First Division. May 27, 1922. Jno. H. Dunn, Clerk. By A. W. Fox, Deputy. [20]

In the District Court for the Territory of Alaska,
Division Number One at Ketchikan.

No. 537—KA.

In the Matter of the Delinquena Tax Roll for THE
CITY OF KETCHIKAN

vs.

MARY A. FURNIVALL,

Objector.

Judgment and Decree.

The issues in the above-entitled matter having been brought to trial before the Court without a jury, on the 3d day of June, 1922, at Ketchikan, Alaska, Mary A. Furnivall, objector, appeared by her attorney, James Wickersham, Esq., and the City of Ketchikan appearing by its attorneys, James M. Shoup, Esq., and Will H. Winston, Esq., and the Court having heard and considered the evidence presented and the arguments of counsel for both parties, and after due deliberation having made its decision in writing in favor of the objector and against the City of Ketchikan, with findings of fact and conclusions of law duly filed in this Court and cause

Now, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the objectors of Mary A. Furnivall to the assessment of the costs of improvement of the Harris Street Extension in the City of Ketchikan, Alaska, against objector and against Lots 1 and 3 in Block 3, Townsite Addition, and Lot 3 in Block E, Schoenbar Addition, in the City of Ketchikan, be and they are hereby sustained, and that the order of sale of said property to satisfy said assessment requested herein by the City of Ketchikan be and the same is hereby denied, and it is

ORDERED that objector herein recover of the City of Ketchikan her costs and disbursements by her in this behalf expended, to be taxed by the Clerk of this Court.

Done at Juneau, Alaska, this 5th day of October, 1922.

THOS. M. REED,
District Judge. [21]

Copy of findings, conclusions of law and judgment and decree received Aug. 15, 1922.

JAMES M. SHOUP,
Of Counsel for Defendant.

Filed in the District Court District of Alaska, First Division. Oct. 5, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. D, page 284. [22]

In the District Court for the Territory of Alaska,
Division Number one at Ketchikan, Alaska.

No. 537—KA.

MARY M. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

Motion to Strike.

Comes now Mary A. Furnivall, one of the objectors in the above-entitled action, and moves the Court to strike from the files in this cause the papers herein marked "objections of the defendant to the findings of fact and conclusions of law and decree" therefore entered by the objector, which papers were filed in this Court by defendant's counsel on Saturday, November 25, 1922, because

they were so filed herein in violation of the oral instructions of the Court, without any order of the Court, or service of copy or notice to objector or objector's attorney of record.

Also moves the Court to strike from the files herein certain papers marked "defendant's proposed findings of fact and conclusions of law" filed on Saturday, November, 25, 1922, because they were so filed herein in violation of the oral instructions of the Court, without any order of the Court, or service of copy or notice to objector or objector's attorney of record.

Dated at Ketchikan, Alaska, this 27th day of November, 1922.

WICKERSHAM & KEHOE.

JAMES WICKERSHAM,

Attorney for Objector.

Filed in the District Court District of Alaska, First Division. Nov. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [23]

In the District Court for the Territory of Alaska,
Division Number one at Ketchikan, Alaska.

No. 537—KA.

MARY M. FURNIVALL,

Objector,

J. M. PETERSON,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

Order on Motion to Strike.

This cause came on to be heard on the 2d day of December, 1922, on motion of the above-named objectors by their attorneys, Wickersham & Kehoe, to strike from the files in this Court and cause the exceptions heretofore filed by the City of Ketchikan to the findings of fact, conclusions of law and decree filed herein by and in favor of said objectors, on November 25, 1922, because they were so filed without an order of the Court, or service of a copy or notice to the above-named objectors or to their said attorneys of record, and the said motion is overruled, to which action of the Court the said objectors each except and their exception is by the Court allowed.

And the cause also came on to be heard on the said 2d day of December, 1922, on the motion of the above-named objectors by their attorneys, Wickersham & Kehoe, to strike from the files herein certain papers marked "Defendant's Proposed Findings of Fact and Conclusions of Law," because they were so filed herein in violation of the oral instructions of the Court, without any order of the Court, or without any service of copy or notice to the objectors herein or to their attorneys of record, and the Court having heard counsel for both objectors and the City of Ketchikan, the motion to strike is allowed and the said papers are now stricken from the files for reasons stated in said motion. [24]

Done in open Court this 5th day of December, 1922.

THOS. M. REED,
District Judge.

Service accepted Dec. 4, 1922. Will H. Winston,
Att'y for City of K ———.

Filed in the District Court, District of Alaska,
First Division, Dec. 5, 1922. John H. Dunn, Clerk.
By W. B. King, Deputy.

Entered Court Journal No. D, pages 309, 310.
[25]

In the District Court for the Territory of Alaska
Division Number One, at Ketchikan, Alaska.

No. 537—KA.

MARY M. FURNIVALL,

Objector,

J. M. PETERSON,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corpora-
tion, Delinquent Tax Roll,

Defendant.

Order Re Bill of Exceptions.

This cause came on to be heard in the District
Court for the Territory of Alaska, First Division,
at Ketchikan, Alaska, on the 25th day of November,

1922, on the motion of Will H. Winston, attorney for the City of Ketchikan, supported by the affidavit of said Will H. Winston, both said motion and affidavit having been filed in this Court and cause on November 13, 1922, in which motion the City of Ketchikan moved to set aside the findings of fact, conclusions of law, and decree heretofore filed in this Court and cause by and in favor of Mary M. Furnivall and J. M. Peterson, objectors, on October 5, 1922, because service thereof and notice of such service was not made on the attorney for the City of Ketchikan; said motion was heard by this Court on said 25th day of November, upon supporting affidavit of Will H. Winston and the opposing affidavit of James Wickersham, filed in this Court and cause on November 24, 1922, and upon the argument of counsel and a consideration of the said affidavits, the motion to set aside the findings of fact and conclusions of law and decree heretofore filed by the said Mary M. Furnivall and J. M. Peterson in this cause and signed by the Judge therein, be and the same was then and there by the Court denied, but upon the said hearing the Court orally ordered that the City of Ketchikan have leave to file *nunc pro tunc* the exceptions [26] which it desires to preserve to the findings of fact, conclusions of law and the decree entered heretofore in this case by and in favor of the objectors, Mary M. Furnivall and J. M. Peterson, to which oral instructions at the time so made, the objectors, Mary M. Furnivall and J. M. Peterson

severally objected and excepted, and their several exceptions were by the Court heard and allowed.

Done in open court this 5th day of December, 1922.

THOS. M. REED,
District Judge.

Service accepted Dec. 4, 1922.

WILL H. WINSTON,
Att'y for City of Ketchikan.

Filed in the District Court, District of Alaska,
First Division. Dec. 5, 1922. John H. Dunn,
Clerk. By ———, Deputy. [27]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 537—KA.

MARY M. FURNIVALL and J. M. PETERSON,
Objectors,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

**Order Extending Time to and Including February
1, 1923, to File Bill of Exceptions.**

This matter coming on regularly for hearing and
it appearing to the Court that additional time is
required within which to settle the bill of excep-
tions herein filed by the City of Ketchikan,

Now, therefore, it is hereby ORDERED that the
above-named defendant be given until February 1,

1923, within which time to settle the bill of exceptions herein filed.

Done in open court this 23d day of December, 1922.

THOMAS M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 23, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. 4, page 377.

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 537—KA.

In the Matter of the Delinquent Tax Roll for
THE CITY OF KETCHIKAN, Alaska,
and the Application for an Order of Sale
Thereon.

No. 537—KA.

MARY M. FURNIVALL and J. M. PETERSON,
Objectors,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

**Order Extending Time to and Including March 20,
1923, to Settle Bill of Exceptions.**

This matter coming on to be tried on this fifth day of February, 1923, upon the application of the

City of Ketchikan [52] for an extension of time in which to settle the bill of exceptions herein, W. H. Winston, Esquire, appearing for the City and no appearance being made on behalf of the above-named objectors, the Court being fully advised in the premises, on motion of W. H. Winston, attorney for the City of Ketchikan, aforesaid,

IT IS ORDERED that the time in which to settle the bill of exceptions in the above-entitled matter be and the same is hereby extended to and including the twentieth day of March, 1923.

Done in Chambers, this 5th day of February, 1923.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Feb. 5, 1923. John H. Dunn, Clerk. By M. D. Morrissey, Deputy.

(Same Title and Cause.)

Bill of Exceptions.

Be it remembered that on the third day of June, 1922, there came on for hearing the objections filed herein the 20th and 25th days of May, 1922, of the above-named Mary M. Furnivall and J. M. Peterson respectively to the application of the said City of Ketchikan for an adjustment and order of sale of certain property in the said City for delinquent

nonpayment of special street grade assessments for the Harris Street Extension, all as set forth in the Delinquent Tax Roll of said City of Ketchikan, duly filed herein on the 20th day of May, 1922, and as set forth in the said objections so filed as aforesaid.

The said objections of both said objectors was heard and determined at one and the same time, and the evidence and proceedings hereinafter enumerated was heard and had in the case of each of said objectors, to wit:

Said Delinquent Tax Roll so filed as aforesaid, was duly presented for adjustment and order of sale. Said roll was and is as follows: [53]

Notice of Delinquent Taxes, Sewer and Street Improvement Assessments on Real Property in the City of Ketchikan.

To Whom It May Concern

Notice is hereby given, that the delinquent tax-roll and delinquent sewer and street improvement assessments of real property for the City of Ketchikan, Alaska, for the years 1918, 1919, 1920, and 1921, has been completed and is now open for public inspection at the office of the City Clerk, and that the same will be presented to the District Court for the Territory of Alaska, Division No. 1, at Ketchikan on the 20th day of May, 1922, for adjustment and order of sale. The following list shows the tracts of land as shown by said delinquent roll, the amount of tax, assessments, penalty and interest thereon, and to whom assessed:

DELINQUENT IMPROVEMENT ASSESSMENTS

		Nov. 20, 1920	\$	79.36	\$	9.64	\$	89.00
Groelinger, A. J.	Bawden Street Sewer	" "		186.32		22.40		208.72
Petty, R. L.	Lot 14-A, Block 13	" "		112.67		13.56		126.23
Naslund, B. N.	Lots 16, & 17, Block 13	" "		112.67		13.56		126.23
Hendrickson, Arndt	Part Lot 1, Block 16	" "		112.67		13.56		126.23
Shelton, James	Part Lot 2, Block 16	" "		79.36		9.64		89.00
Wyckoff, J. M.	Part Lot 2, Block 16	" "		79.36		9.64		89.00
Harvey, Mrs. M.	Lot Florida Mining Claim	" "						
	Lot Florida Mining Claim	" "						
	Front Street Grading and Sewer							
Abercrombie, E.	Part Lot 57, Block 9	Jan. 29, 1921	180.73	27.11	21.86			229.70
	Harris Street Extension							
Furnivall, F. J.	92.68 feet (Lot 11, Block E. S. Addn.)	Jan. 1, 1922	353.10		11.06			364.16
Furnivall, F. J.	79.79 feet (Lts 1&3, Blk 3, S. Addn.)	" "	304.00		9.53			313.53
Peterson, J.	34 feet (Lot 2, Blk 3 S. Addn.)	" "	129.50		4.07			133.57
Smith, C. A.	12 feet (Lot 4, Blk 3 S. Addn.)	" "	40.35		1.25			41.60
	Paving Intersection Dock and Main							
	Streets							
Independent Or. R. M.	Lot 1, Block 21	Dec. 1, 1921	379.31	51.90	14.44			445.65
	TOTAL.....		\$2154.88	\$79.01	\$154.31			\$2388.20
..	Total Real Taxes Delinquent.....				\$1786.11			
	Total Improvement Assessments Delinquent.....				2388.20			
	TOTAL				\$4,174.31			

I hereby certify that the above and foregoing is a true and correct roll of the delinquent taxes and delinquent street improvement assessments of the City of Ketchikan, upon real property for the years 1918, 1919, 1920, and 1921, and showing the date when said taxes, and street assessments became delinquent, and showing the total amount of such delinquent taxes and assessments, penalty and interest separately stated, and the aggregate of the whole thereof.

During the time of the publication of the foregoing notice, and up to the time of the order of sale by the court, any person may appear and make payment to the City Treasurer on any piece or tract therein, together with the penalty and interest.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the City of Ketchikan this 17th day of February, 1922.

[Seal]

WILL H. WINSTON,

City Clerk.

Publish February 20, 27. March 6, 13, 20. [54]

Affidavit of Publication.

District of Alaska,

Division Number 1,—ss.

Ray S. Steele, being duly sworn, says, That he is the principal clerk of the Ketchikan "Alaska Chronicle," a daily newspaper published at Ketchikan, in said Division and District, and that the publication annexed was published in said newspaper at least once a week and every week for four successive weeks, commencing on the 20th day of February, 1922, and ending on the 20th day of March, 1922.

RAY S. STEELE.

Subscribed and sworn to before me this seventh day of July, 1922.

WILL H. WINSTON,
Notary Public for Alaska.

Commission expires June 16, 1915.

Filed in the District Court, District of Alaska,
First Division. July 7, 1922. John F. Dunn, Clerk.
By M. D. Morrissey, Deputy.

(It was orally agreed between counsel that the notice of delinquent taxes, sewer and street improvements assessments on real property in the City of Ketchikan, need not be annexed to the foregoing affidavit; said notice having been already annexed to and made a part of the objections filed in the above-entitled case.) [55]

Saturday, June 3, 1922, 2 o'clock P. M.

Court met pursuant to adjournment.

Whereupon to sustain said objections, said objectors introduced the following evidence, and the following proceedings were had, viz.:

Testimony of Frank J. Furnivall, for Objectors.

FRANK J. FURNIVALL, one of the objectors herein, called as a witness on behalf of the objectors, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By JAMES WICKERSHAM.)

Q. You may state your name.

A. Frank J. Furnivall.

Q. Do you know Mary A. Furnivall? A. I do.

Q. What relation is she to you, if any?

A. My wife.

Q. How long have you and Mrs. Furnivall been married? A. Sixteen years this month.

Q. I call your attention to some tracts of land in the incorporated town of Ketchikan, shown on a map of Ketchikan townsite addition, United States survey No. 1381, and ask you to point out, if you can, what property there belongs to Mary A. Furnivall?

A. Lots one, two and three—two lots under an agreement of sale.

Q. To a man named Peterson? A. Yes.

The COURT.—That's lots one and three.

(Testimony of Frank J. Furnivall.)

Q. Lots one and three, then, belong to Mary A. Furnivall? A. Absolutely.

Q And lot two formerly belonged to Mary A. Furnivall?

A. Under an agreement of sale. [56]

Q. To whom? What is Mr. Peterson's name?

A. J. M. Peterson.

The COURT.—That is what is called the S. Addition?

The WITNESS.—Well, it's called on this map, your Honor, Ketchikan Townsite Addition, Alaska, U. S. Survey No. 1381, and the map further bears this statement: "I hereby certify that this plat of U. S. Survey No. 1381—" Strike that out. It's dated January 26, 1922. "I hereby certify that this plat of U. S. Survey No. 1381, Ketchikan Townsite Addition, Alaska, as surveyed under special instructions dated February 7, 1921, by Otis Ross, U. S. Cadastral engineer and E. D. Calvin, U. S. Surveyor, in accordance with the provisions of the act of March 3, 1891 (26 Stat. 1095), is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved. Karl Theile."

Mr. WICKERSHAM.—So that the matter may be before the Court, I offer this map in evidence.

The COURT.—Any objection?

Mr. WINSTON.—No objection.

The COURT.—It may be received and filed.

Mr. WICKERSHAM.—I ask to have it filed and marked.

(Testimony of Frank J. Furnivall.)

(Whereupon said plat was received in evidence and marked Objector's Exhibit No. 1.)

Q. Has Mrs. Furnivall another lot on that same street? A. Yes, sir.

Q. Do you know the number of that lot and what addition it's in?

A. That is near the Ketchikan Consolidated Mines Company property.

Q. I show you a map, now, marked "Plat of Schoenbar Addition [57] part of Florida Mining Claim, Ketchikan, Alaska," dated April 15, 1921, signed by Joseph Ulmer, C. E., and ask you if you can locate the other lot on that chart.

A. (After examining plat.) Yes, sir.

Q. What is the number? A. Lot 11.

Q. Lot 11 in block E?

A. Block E, I think it is; lot 11.

The COURT.—That is the Schoenbar Addition?

Mr. WICKERSHAM.—Yes; that's in the Schoenbar Addition. I'll point out to the Court directly the difference—

The COURT.—Very well.

Mr WICKERSHAM. (Continuing.)—in the description. They are not properly described at all.

Q. Do you know when Mrs. Furnivall secured title to those properties that you have described?

A. September 5, 1919.

Q. In what way?

A. That particular piece by a deed from myself.

Q. You mean, lot 11 in block E?

(Testimony of Frank J. Furnivall.)

A. Lot 11, block E.

Q. Schoenbar Addition?

A. Yes; and up to lot 3.

Q. On the same day? A. Yes.

Q. By a deed from you? A. Yes.

Mr. WICKERSHAM.—If counsel wishes to bring the record of the original deed in and read it into the record—

Mr. SHOUP.—We'll admit that it's recorded.
[58]

Mr. WICKERSHAM.—You admit that it is recorded. I'm not going to introduce this map of the Schoenbar Addition in evidence because I haven't got any other copy, and I had to borrow that from the city, from the surveyor, but I offer it to the Court for its inspection during the trial.

The COURT.—This must have been filed of record in the recorder's office?

Mr. WICKERSHAM.—I assume so. That will be admitted, won't it—that this map was recorded also?

Mr. SHOUP.—I don't know about that. I know the deed was.

Q. Do you know whether this plat is of record or not?

A. No, sir; it happened since I was away.

Q. You mean the one made by the Government?

A. This one happened since I was away.

Q. This one also.

Mr. WICKERSHAM.—Now, may it be admitted

(Testimony of Frank J. Furnivall.)

that there is a patent issued by the Government of the United States to the Florida Mining Claim?

Mr. SHOUP.—Yes; we'll admit that.

Mr. WICKERSHAM.—And will it be admitted that Ketchikan Creek is not a meandering stream, but a stream merely flowing across that claim?

Mr. SHOUP.—I don't know.

Mr. WICKERSHAM.—Well, then, we'll have to send for the record of patent.

The WITNESS.—No. 4610.

Q. 24610? A. No; 4610.

Q. In what book? A. Last book. [59]

Mr. WINSTON.—I can't see where it is material.

Q. Referring now to the Government map of the lands beyond the Florida claim, where lots 1, 2 and 3 are, I wish you would state if there is a patent for that ground?

Mr. WINSTON.—If your Honor please, the objector, in his objections filed, Mrs. Furnivall's objections, he states that that is unpatented land, and now he is introducing other evidence that he doesn't state in his objection. So we move, in as much as it is not stated in the objection—

Mr. WICKERSHAM. (Interrupting.) Yes, I am going to reach that matter, right now.

Q. With respect to lots 1, 2 and 3, in what block is that? A. Block 3, I think.

Q. Block 3, on the map of Ketchikan Townsite Addition, survey No. 1381. State if that land is patented land?

(Testimony of Frank J. Furnivall.)

A. No, sir; the title is in the Government right now.

Q. How did Mrs. Furnivall and those through whom she claims, secure possession of that property?

A. I presume by squatter's right. The first, original, possessor was a squatter, I presume, and she bought the squatter's right.

Q. In other words, it's public lands? A. Yes.

Q. It has been recently surveyed, however, by the Government surveyor? A. Yes, sir.

Q. Has Mrs. Furnivall a patent or deed from the Government for it? A. No, sir.

Q. She has only a squatter's claim to it? [60]

A. At the present moment; yes, sir.

Q. From the antecedent possessor she has a deed? A. Just a quitclaim deed.

Q. That's all; is it? A. That's all.

Q. Now, is that true of all the land shown on this map, in that particular addition?

A. I don't think any of these people have got their title yet.

Q. Has any application been made, or suggestion, to Mrs. Furnivall with respect to securing title from the Government?

A. Just about ten days ago, she received a letter from Mr. Parks.

Q. Who is Mr. Parks?

A. The trustee appointed by the Government.

Q. Of this land? A. Yes.

(Testimony of Frank J. Furnivall.)

Q. The land has been surveyed under instructions of the Government and they are ready now to issue deeds? A. Title; yes.

Q. Is that it?

A. Yes; they have written to us to ask us to put in notice of our claims.

Testimony of E. G. Morrissey, for Objectors.

E. G. MORRISSEY, called as a witness on behalf of the objectors, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. What record is this (indicating a book), Mr. Morrissey? is it volume 1?

A. Volume No. H. [61]

Q. Of deeds? A. Yes, sir.

Q. Of what records?

A. Of Ketchikan Precinct.

Q. The record of deeds of Ketchikan Precinct?

A. Yes, sir.

Q. I wish you would turn to the patent for the Florida Mining claim? A. Yes.

Q. What page does that begin on?

A. No. 4610. Begins on page 102.

Q. What is the date of that patent?

A. The first day of February, 1919.

Q. When was it recorded?

A. Filed and made of record this eleventh day of August, 1919, at nine o'clock A. M.

(Testimony of E. J. Morrissey.)

Q. In the records of the Recorder's Office in this precinct? A. Yes, sir.

Mr. WICKERSHAM.—Now, may it please the Court, we offer this in evidence.

Mr. SHOUP.—What claim is that, Judge?

Mr. WICKERSHAM.—Florida mining claim.

Mr. SHOUP.—Well, the Furnivall claim is not on that claim.

Mr. WICKERSHAM.—One is on this claim.

Mr. SHOUP.—The other—

Mr. WICKERSHAM.—(Interposing.) The other is on the public lands.

Mr. SHOUP.—That includes the Peterson claim.

Mr. WICKERSHAM.—That includes lots 1, 2 and 3, including the Peterson claim, which is on the public lands, and one claim—11—is on the Florida. [62]

Mr. WICKERSHAM.—May it please the Court, there are about 16 other claims in this patent, and I only want to offer so much of it as relates to the Florida. If you will read the description of the Florida from this patent, Mr. Morrissey.

WITNESS (Reads):

“Beginning, for the description of the Florida lode claim, at corner No. 1, a schistose stone in place, 24 by 18 by 6 inches, above ground, marked 4-1-769, with a cross on top at corner point, with mound of stone, identical with corner No. 4 of said Texas lode claim, from which U. S. location monument No. 4 bears south 29 degrees, 7 minutes and 46 seconds east, 1888.04 feet distant; thence

(Testimony of E. J. Morrissey.)

first course, north 30 degrees, 25 minutes east, 600 feet to corner No. 2, identical with corner No. 4, of said Homer lode claim, also marked 2.

“Thence, second course, north 59 degrees, 35 west, 10005 feet to corner No. 3, a schistose stone, 24x12x4 inches, marked 3-769, with a cross on top of the corner point, with mound of stone.

“Thence, third course, south 30 degrees, 25 minutes west, 300 feet to the point from which discovery bears south 59 degrees and 35 minutes east, 600 feet distant, 592.03 to intersect line 1-2 of survey No. 586 of the Afterthought lode claim. The Afterthought lode claim, 600 feet to corner No. 4, a schistose stone, 24 by 11 by 6 inches, marked 4-769, with a cross on top at corner point, with mound of stone.

“Thence, fourth course, south 59 degrees and 35 minutes East, 1500 feet to corner No. 1, to the place of beginning of survey or lode claim as above described, extending 1500 feet in length along said Florida vein or lode.” [63]

Q. Mr. Morrissey, it's been suggested that we haven't qualified you. What is your official position?

A. United States Commissioner and Recorder.

Q. In the Ketchikan Precinct? A. Yes, sir.

Q. Of Alaska? A. Yes, sir.

Q. You say this is one of the records of your office? A. Yes, sir.

Q. Now, may it please the Court, I'll also offer in evidence the granting clause. The rest of the

(Testimony of E. J. Morrissey.)

patent would be merely descriptive of other claims, and I will ask the witness to read this much.

Mr. SHOUP.—What is the object of that evidence?

Mr. WICKERSHAM.—I say, there are a lot of other claims mentioned in the same patent, and I am not offering anything with respect to them, but I am offering, now, the granting clause of the patent.

Mr. SHOUP.—Oh; no objection.

Q. You just read it.

The COURT.—Well, aren't the patents or the granting clause all alike?

Mr. WICKERSHAM.—It's all alike—

The COURT.—(Interrupting.) I don't see the necessity, then—

Mr. WICKERSHAM.—There are some reservations in those, and I wanted to show that there was no reservation that made any difference.

The COURT.—Well, you may show that.

Q. Just read that.

A. WITNESS (Reads): [64]

“Now, know ye that there is, therefore, pursuant to the laws aforesaid, hereby granted by the United States unto the said James A. Davis, the said mining premises hereinabove described and not expressly excepted from these presents, and all that portion of the said veins, lodes or ledges and all other veins, lodes and ledges, throughout their entire depth, the tops or apexes

of which lie inside the boundary line of said granted premises in said survey, extending downward vertically, although such veins, lodes or ledges, in their downward course, may so far depart from the perpendicular as to extend outside of the vertical side lines of said premises. Provided, that the right of possession to such outside parts of said veins, lodes or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downward, though the end lines of said survey so continue in their direction that such planes will intersect such exterior parts of said veins or lodes or ledges. And provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

“TO HAVE AND TO HOLD such mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature, thereunto belonging, unto the said grantee above named, and to his heirs and assigns forever; subject, nevertheless, to the above-mentioned and the following conditions and stipulations:

“First, that the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, and sites for reservoirs used in connection with such water rights as may [65] be recognized and acknowledged by legal laws, customs and decisions of courts. And there is reserved from the lands hereby granted, a right of

way thereon for ditches or canals constructed by the authority of the United States.

“Second, that in the absence of necessary legislation by Congress, the Legislature of Alaska may provide rules for working the mining claims or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

“In testimony whereof, I, Woodrow Wilson, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

“Given under my hand in the City of Washington, the first day of February, in the year of our Lord 1919 and of the independence of the United States the one hundred and forty-third.

“By the President,

“WOODROW WILSON.

“By W. P. Leroy,

“Secretary.

“L. I. C. LAMAR,

“Recorder, General Land Office.”

Seal of the United States General Land Office.

Recorded Patent No. 663,496.

Filed and made of record this eleventh day of August, 1919, at nine o'clock A. M.

W. P. MAHONEY,

Recorder.

Testimony of F. J. Furnivall, for Objectors (Recalled).

F. J. FURNIVALL, recalled, having been previously sworn, testified as follows:

Q. Now, have you got a copy of the published document? A. Yes. [66]

Q. Mr. Furnivall, calling your attention, now, to the notice of delinquent taxes, sewer and street improvement assessments on real property, in the City of Ketchikan, filed in this court on May 22, apparently 22, I notice that you are said in this tax roll to be the owner of 92.68 feet, being lot 11 in block E, Schoenbar Addition, on January 1, 1922. Were you the owner at that time?

A. No, sir.

Q. Had not been since when?

A. Since September 5, 1919.

Q. And you are also said to be the owner in there of 79.79 feet, in Schoenbar Addition, lots 1 and 3 in block 3, at that time. What is the fact about that?

A. I never did own lot 3, and I had, up to September 5, 1919, been the owner of 1 and 2.

Q. In what addition?

A. In what was then known as the Schoenbar Addition.

Q. And these are now—where are those lots one and three now?

A. They are now 1, 2 and 3 in this new subdivision made by the Government.

(Testimony of F. J. Furnivall.)

Q. And not in this Schoenbar Addition at all?

A. No; the old tracts are all excluded. It was on the tracts all of which was excluded from the patent. They had 34 claims there.

Q. Do you know whether Mary M. Furnivall ever signed any petition for the improvement of these lots by the Harris Street Extension or road?

A. I do, sir.

Q. What is the fact about that?

A. She never signed it. [67]

Q. Do you know whether or not she made any protest against it? A. I do, sir.

Q. When?

A. The exact date I haven't got. I haven't got that exact date, but it is among the papers—somewhere in March.

Q. Look— 1900 and what? A. 21.

Q. In 1921? A. Yes.

Mr. WICKERSHAM.—I think that it is admitted in these pleadings, however, Mr. Winston, that that was March 3, 1921.

Mr. WINSTON.—Yes.

Mr. WICKERSHAM.—And it's admitted that the protest was signed on March 3, 1921.

Mr. WINSTON.—That is what it is dated.

Mr. WICKERSHAM.—Yes; that's what it is dated. I think that is all.

Cross-examination.

(By Mr. SHOUP.)

Q. This protest that you refer to, Mr. Furnivall,

(Testimony of F. J. Furnivall.)

is signed by Mary A. Furnivall as your wife,—
she is your wife, is she not? A. Yes.

Q. It was signed after these improvements had
all been made? A. Yes, sir.

Q. Improvements on the Harris Street addition,
building the street. She protested against the pay-
ment of the taxes. That was after the improve-
ments had been made and the tax levy had been
made and apportioned? A. Yes, sir.

Q. Is it not? [68] A. Yes, sir.

Q. Now, Mr. Furnivall, how many lots were
deeded to her? A. How many lots did I?

Q. Yes; how many? A. In September, 1919?

Q. Yes; how many lots?

A. I deeded her 150 feet, more or less along
the Schoenbar tram.

Q. Was that all that was deeded to her?

A. That was all that was deeded to her.

Q. That's three lots, is it?

A. Yes; the records show.

Q. How? A. The records show three.

Q. That is what I am asking.

(Witness excused.)

Testimony of Will H. Winston, for Objectors.

WILL H. WINSTON, called as a witness on
behalf of the objectors, having been first duly sworn
to tell the truth, the whole truth and nothing but
the truth, testified as follows:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name, Mr. Winston?

(Testimony of Will H. Winston.)

A. Will H. Winston.

Q. What official position do you now hold?

A. City Clerk and municipal magistrate, city of Ketchikan.

Q. For how long have you been city clerk of Ketchikan? A. Since May, 1919.

Q. I call your attention now to the manner of the proceedings in the improvement of Harris Street Extension. You may state to the Court where that street is, in general phrases? [69]

A. The street commences at the end of the old townsite and goes through the Florida mining claim and extends on past the Florida mining claim into the Texas mining claim.

Q. Do you know the length of the improvement?

A. No, sir. I can give you approximately the length from my memory only.

Q. Approximately 876 feet?

A. I thought it was more than that.

Q. Well, how much?

A. I couldn't tell you from memory.

A. I call your attention to a map called "U. S. Survey No. 1381," being a Government survey of the premises north and south of Harris Street Extension, and ask you as to what lots there were assessed?

A. Lots 1, 2, 3, 4, 5, 6 and 7, in block 3.

Q. They are all on the north side of Harris Street? A. They are.

Q. Was any assessment made on any property on the south side of Harris Street?

(Testimony of Will H. Winston.)

A. There was not.

Q. Now I call your attention to another chart, called "Plat of Schöenbar Addition, part of Florida Mining Claim, Ketchikan, Alaska, April 15, 1921, by Joseph Ulmer, C. E." and ask you to say what lots on that plat were also assessed?

A. Lots 2, 3, 4, 7, 6, 8, 9, 10, and 11, I believe. If you will bring in the records, I'll be able to tell you absolutely. Give me that book (indicating). (Counsel hands book to witness). All these lots along this north side.

Q. That you have enumerated?

A. Yes. [70]

Q. That you have named? Was any assessment levied, of any kind, upon any property on the other side of the street, in front of those lots?

A. No, sir.

Q. Now, Mr. Winston, have you got the original petitions upon which this work was done?

A. Yes, sir.

Q. I wish you would produce them.

(Witness does so.)

Q. Which is the first one you have, Mr. Winston?

A. The first one was filed with the city clerk on January 15, 1919.

Q. Just read it.

(Witness reads as follows:)

"To the Honorable Mayor and Common Council
of the City of Ketchikan:

"We, the undersigned, being the owners of more than two-thirds of the real estate fronting on

(Testimony of Will H. Winston.)

the westerly side of the Schoenbar tram, within the city limits, from the intersection of Harris Street with the tram, do hereby respectfully petition your honorable body to construct from said intersection, to the city limits, on the northerly side of Ketchikan Creek, a street of the mean width of twenty feet, with provision for a sidewalk in the future, and we each for himself or herself, hereby agree to pay *pro rata* per front foot, our due proportion of the total cost of construction, and hereby acknowledge such expense to be a lien on the property of the undersigned, abutting on said proposed street to the extent of such *pro rata*. [71]

Name.	Frontage
Alaska Investment Co., F. E. Ryus, Pres.	
F. J. Furnivall	100 ft., more or less
W. P. Boos	70 ft., more or less
John Koel	100 ft., more or less
E. M. Horton	34 ft., more or less
Beatrice P. Dickinson, M. D.	80 ft., more or less

Q. Can you tell from the records of the City Council of Ketchikan what was done with that petition?

A. The petition was read and referred to the street committee.

Q. What was ever done with it after that?

A. That was before my time on the Council, and I don't know what was done with it.

Q. Now, the next one.

(Testimony of Will H. Winston.)

Mr. SHOUP.—In reading that petition, I think you read it “two-thirds of the property.” I think you left out the words “in value.”

The WITNESS.—No. “Of more than two-thirds of the real estate fronting on the westerly side of Schoenbar tram.” That’s the first petition.

Q. Yes. Now, the second.

The COURT.—You say you could find nothing after its reference to the committee in the way of a report of the committee on that petition?

The WITNESS.—No; I said that I haven’t been able to find it. The matter was called to my attention this morning, and I haven’t been able to find the time since to look it up. It was before my time and it’s all in longhand. [72]

Q. All right, now, Mr. Winston.

(Witness reads:) The second petition is dated Ketchikan, Alaska, September 7, 1920.

“To the Common Council,

“Ketchikan, Alaska:

“We, the undersigned property owners along the right of way and public thoroughfare following the course of and upon which is located the tramway belonging to the Ketchikan Consolidated Mines Company, and locally known as the Schoenbar tram, do herewith respectfully petition your honorable body to proceed at the earliest opportunity to erect, construct and maintain a temporary street for vehicle passage; said street to be 16 feet in width, with a four-foot sidewalk. We here-

(Testimony of Will H. Winston.)

with agree to pay our respective *pro rata* of the expense of same.

“Mrs. O. F. HILL.

“ED. M. HORTON.

“C. V. TRILL.

“M. H. SMITH, Sr.

“J. M. PETERSON.

“C. A. SMITH.

“M. H. SMITH, Jr.

“R. A. BARTHOLOMEW.

“W. P. BOOS,

“By Mrs. WM. P. BOOS.

“JOHN KOEL.”

Q. What was done with that petition?

A. Accepted September 8, 1920, and placed on file.

Q. What else was done with it, Mr. Winston—anything else? A. No, sir.

Q. Now, there was another petition. Now, with respect to this petition, Mr. Winston, was it considered by the Council and by you with respect to its validity at the time it was filed? You were then city attorney? A. Yes, sir.

Q. You were then city clerk?

A. Yes, sir. [73]

Q. What about that?

Mr. SHOUP.—I think, if your Honor please, that is immaterial.

The COURT.—That's a question. I think the question brings out whether it was considered or not.

(Testimony of Will H. Winston.)

The WITNESS.—What is the date of it?

Mr. WICKERSHAM.—The date is September the eighth. I want to know the action of the Council.

The COURT.—Yes.

A. September 8; what year?

Q. September 8, 1920.

A. I'll read the minutes on that date:

“A special meeting of the Common Council of the City of Ketchikan, was held on the above date. Present were: Mayor D. W. Hunt, councilmen John A. Anderson, George Morrison, William Anderson and H. Nixon. Absent councilmen: G. E. Paup and Ed. J. Williams.

“The Mayor announced that the meeting had been called for the issuance of dance hall permits and —”

Q. (Interrupting.) Well, just in relation to this.

A. That's what I am getting to. (Continues reading):

“Petition of the property owners on Harris Street or Schoenbar tram, for a street, was read and a motion was duly and regularly made and carried that the petition be accepted and placed on file, a survey ordered and the city engineer to have specifications for the same in at the next meeting so that bids could be called for.”

Q. Now there was another one?

A. Yes, sir.

Mr. SHOUP.—This is the second petition?

Mr. WICKERSHAM.—The second petition.

(Testimony of Will H. Winston.)

Q. Now, there was a third petition. Isn't it true that after this petition was presented, you prepared another petition? A. No, sir.

Q. What did you have to do with the preparation of the third petition?

A. I prepared the third petition.

Q. At whose request?

A. I don't think it was at the request of anybody. I think at that time, I told the people, told the council that it would be best for me to prepare petitions in the future.

Q. Isn't it true that you told them that this petition was irregular and insufficient and that you would prepare another one?

A. I thought that another petition had better be presented.

Q. Well, you heard my question?

A. I told them that I thought another petition had better be presented.

Q. That you thought this was insufficient?

A. I thought it didn't cover the point.

Q. And this petition, then, was not further acted upon in any way, was it?

A. The Council ordered the city engineer to go ahead with it.

Q. When was that done—just as you have read?

A. Just as I have read.

Q. Now about the third petition.

(Witness reads:)

“To the Honorable Mayor and City Council of the City of Ketchikan, Alaska:

(Testimony of Will H. Winston.)

Q. That doesn't describe the lots or anything of that kind.

(Witness, continuing:)

"We, the undersigned, constituting more than two-thirds [75] in value of the property owners whose property abuts upon the proposed improvement, hereby petition your honorable body to construct a sixteen-foot plank roadway and a four-foot sidewalk and to lay out, establish and maintain a forty-foot right of way, from the present Harris Street, in front of the Parker house to and past the Harry Smith house or to the city limits.

"And we agree, hereby agree to pay to the city of Ketchikan our proportionate share of two-thirds of the cost of such improvement and that such sum be a specific lien upon our respective property abutting on said improvement.

"Name

Description of Property No. feet

"C. V. TRILL.

"C. A. SMITH.

"LORETTA C. HILL.

"M. H. SMITH.

"JOHN KOEL.

"MR. W. P. BOOS.

"By Mrs. W. P. BOOS.

"E. M. HORTON.

"P. M. ZILLER.

"By W. F. STIVEN, Attorney in fact."

Ordered approved and filed, October 5, 1920.
Will H. Winston, City Clerk.

(Testimony of Will H. Winston.)

Q. Well, tell of the proceedings of the Council with respect to that petition and say what the Council ordered done with it?

(Witness reads:)

“The amended petition on Harris Street was read and on motion by Councilman Paup, seconded by Councilman Morrison, the same was approved and ordered placed on file. The motion carried. A motion was regularly made and carried [76] that bids be called for on the work on Harris Street, to be in by the next regular meeting, by the city clerk.”

Q. Was that done? A. Yes, sir.

Q. And bids were received? A. Yes, sir.

Q. From whom?

A. Well, I think there was about a half-dozen bids.

Q. To whom was the contract let?

A. To Houck & McGrath.

Q. Was the street constructed? A. Yes, sir.

Q. Under that contract? A. Yes, sir.

Q. How much was paid, if you remember, in round numbers? A. No, I don't.

Q. Well, did the city pay it? A. Yes, sir.

Q. Something over four thousand dollars. Can you find out just what it was?

A. \$4958.80. I have a letter from the engineer's office, showing the exact figures.

The COURT.—It is admitted on the—

Mr. WICKERSHAM.—Yes, I think it is. It is admitted that the contract price was \$4958.80;

(Testimony of Will H. Winston.)

that \$1656.95 of that amount was paid by the city to the contractor on September 1, 1920, and that \$3301.85 was paid January 12, 1921; and that something like \$17.40, for publication and so forth, was paid at another time. That's about correct, isn't it?

A. I think that is about correct. [77]

Q. In the matter of ordering this improvement, was any ordinance passed by the city at any time?

A. No, sir.

Q. You have read the whole proceedings with respect to ordering that work done?

A. You mean all the minutes in regard to it?

Q. With respect to ordering the work; yes.

A. No, I don't think I have. I think it would take more than an hour to read all the minutes with respect to the orders given on that work.

Q. But there was no ordinance passed?

A. No.

Q. What other orders did you have in the matter? You are one of the attorneys in this case?

A. Yes, sir.

Q. For the City? A. Yes.

Q. And you have the matter very clearly in mind? A. Well, I think so.

Q. What other ordinances or orders were made ordering this work to be done?

A. Well, I have one in particular that I remember, and that was Mr. Furnivall had the engineer change the grade of the street so that he could put his garage in a different location, and, I don't

(Testimony of Will H. Winston.)

know—there was some trouble about that—and the engineer changed the grade—

Q. (Interrupting.) Was an ordinance passed in relation to it? A. No.

Q. Was any ordinance passed, authorizing this work, of any [78] kind? A. No, sir.

Q. There were two resolutions passed?

A. Yes. I think there were three.

Q. They are set out in the pleadings in this case and admitted? A. Yes, sir.

Q. Was there any other authority ordered or put forth by the City Council with respect to ordering this work done, except those resolutions and the order that you read? A. Any—

Q. Any ordinance or resolution other than those in the pleadings? A. No, sir.

Q. Those are all? A. Those are all.

Q. So that the validity of the assessment depends upon those resolutions?

Mr. SHOUP.—I object to that, if your Honor please.

Mr. WICKERSHAM.—Well, that is not a very happy way of putting it in. I'll withdraw that. But witness is one of the counsel and I thought I could—

The COURT.—(Interrupting.) I want to ask this right there: Was there any return of any estimate made to the Council of the value, of the amount of this work—what it would cost?

The WITNESS.—I think that the engineer gave an estimate of the value; in fact, before the bid

(Testimony of Will H. Winston.)

was accepted, the engineer advised what that work should cost, and it is my remembrance that the work was done a good deal under what he said it would cost. The bid— [79]

Q. (Interrupting.) Was there any hearing held by the City Council with respect to determining the benefits to the property to be assessed, in any way?

A. Well, all the property that is along that street—

Q. (Interrupting.) No; I asked you if there was any hearing held by the City Council?

The COURT.—Any notice?

Q. Any notice or hearing held for the purpose of determining the question of benefits to the property, or damages?

A. They appeared at every meeting. That is the only way I can answer that.

Q. That's all the answer you wish to give to that?

A. That is the only answer I can give.

Q. Was there ever any finding made by the City Council with respect to the benefits or damages to be attached to or accruing to this property?

A. Yes, sir.

Q. When was that done?

A. When the resolution was passed.

Q. Which resolution?

A. The first resolution.

Q. Was there a hearing held at that time?

A. Oh, I misunderstood your question. You asked me if there was a hearing held—

Q. (Interposing.) Yes.

(Testimony of Will H. Winston.)

A. I understood your question to be whether the Council assessed any benefits.

Q. No, no; I didn't ask you that. I asked you if there was any notice had, notice given, any hearing held, so that the owners of the property could be held with respect to assessments [80] or benefits or damage to their property?

A. No published notice was sent out other than a notice of council meeting.

Q. That's all? A. That's all.

The COURT.—Was there any notice given at or prior to the time of the assessment, of the amount of the assessment against each lot belonging to a particular property owner, so that he could object to the assessment?

A. The amount of the assessment wasn't made until the resolution was passed. It wasn't suggested.

The COURT.—Was there any notice given of the assessment to the property owners so that they could object to the amount of the assessment on a particular lot?

A. No notice to property owners.

The COURT.—Then this assessment was made all *ex parte*, was it? A. Yes, sir.

Q. (By Mr. WICKERSHAM.) It was all made long after the work was done—these resolutions or the assessments?

A. There were two resolutions passed and the reason for the change in the resolution was to have the property owners present there.

(Testimony of Will H. Winston.)

Q. On February second, the first of these resolutions was passed? A. Yes.

Q. And the work had been completed in December and January, previous to that? A. Yes.

Q. Now, no ordinance had been passed by the City, authorizing [81] this work in any way, up to February 2, 1921? A. No.

Q. And then, this first resolution was passed, which is set out in the pleadings? A. Yes.

Q. Thereafter a second resolution was passed on December 21, 1921? A. Yes.

Q. Is that in the pleadings?

A. Yes. And the reason that that resolution was passed was because the property owners came there and objected to the first one.

The COURT.—All the property owners?

The WITNESS.—The ones that were affected by it.

Q. Did Mrs. Furnivall appear?

A. Mrs. Furnivall appeared by Mr. Furnivall.

Q. I did not ask you that.

A. She wasn't there personally, but he was there.

Q. And a lot of other people? A. Yes.

Q. Who was there?

A. That I am unable to say. There were so many different times. I can tell you the ones that appeared there at various times, but the exact times they appeared, I couldn't be able to tell you.

Q. Now, Mrs. Furnivall objected in writing, didn't she? A. Some time afterward.

(Testimony of Will H. Winston.)

Q. Well, now, get that and read it, won't you please, to the Court—her objections?

(Witness reads:) “Ketchikan, Alaska—” [82]

Q. (Interrupting.) What is the date of that?

A. I'll give you that if you wait a minute. (Continues reading:)

“Ketchikan, Alaska, March 2, 1921.

“To the Mayor and Common Council of Ketchikan:

“We, the undersigned occupiers and residents abutting what is locally known as Shoenbar Tram, protest against the assessment levied February 2, 1921, for street improvements for several reasons, amongst which are the following, viz.: first, that all the abutting owners have not been assessed; second, that the petition under which the work was carried on had not the support of sufficient in interest.

“J. M. PETERSON.

“W. A. HAGEVIG.

“MARY M. FURNIVALL.

“R. E. MacGLASHAN.

“W. P. BOOS.

“BEATRICE P. DICKINSON.”

Q. Were those the character of the objections made by the other people who appeared there?

A. They all didn't object.

Q. They all did not object? A. No.

Q. Well, these people did?

A. These people did; yes, sir.

Q. What is the date of that?

(Testimony of Will H. Winston.)

A. That is dated 3-2-21.

Q. March 3, 1921? A. March second, 1921.

Q. March second. And the resolution had been passed February 2, 1921? A. Yes, sir.

Q. Now, subsequently there was another resolution? A. Yes, sir. [83]

Q. In the meantime you had had a deed to some of that property, Mr. Winston, had you not?

Mr. SHOUP.—What? A deed to what?

Mr. WICKERSHAM.—To some of the property on the south side of the street.

A. I don't recall the date of that. You have got it there, I think.

Q. It's set out. A. In your objections?

Q. Yes; set out in my objections. It's an exhibit. A. No; not the deed—is it?

Q. It's Exhibit "C"; dated November 3, 1921.

A. Thirtieth of November, you say here.

Q. Thirtieth of November, 1921?

A. In your objections.

Q. Well, it's the third, if your Honor please.

The COURT.—Yes; it's here as November 3d. I think a copy of the deed is attached—

Mr. SHOUP.—It's Exhibit "C"?

Mr. WICKERSHAM.—Exhibit "C."

Q. You have examined that exhibit, Mr. Winston? A. I think I have; yes, sir.

Q. I think you told me that you thought it was a correct copy?

A. I think so. You're very good in that way.

Mr. WICKERSHAM.—I desire to read that

deed, then, into this record, may it please the Court.

The COURT.—Well, all right.

Mr. WICKERSHAM.—(Reading:) “This indenture, made the third day of November, 1921, by and between the Ketchikan Consolidated [84] Mines Company—

Mr. SHOUP.—(Interrupting.) Your Honor, it seems to me it's unnecessarily encumbering the record.

The COURT.—He can read it.

Mr. WICKERSHAM.—It's very short (continues reading:) —“a corporation, organized under the laws of the State of Maine, appearing by Charles H. Cosgrove, its duly authorized attorney in fact, first party, and the City of Ketchikan, a municipal corporation of the Territory of Alaska, second party; Witnesseth, That in consideration of One (\$1.00) Dollar and other valuable considerations paid to the said first party by said second party, receipt whereof is hereby acknowledged, said first party does herewith grant, convey and dedicate to said second party, for the purpose of a public road only, all of that certain strip of ground beginning at the southerly end of Harris Street, so called, where the same enters the Florida mining claim and continuing across said Florida mining claim, with a width bounded by the westerly side of said street, as platted by Joseph Ulmer, C. E., on the one side and the middle of Ketchikan Creek on the easterly side.

(Testimony of Will H. Winston.)

“IN WITNESS WHEREOF, the said first party has caused these presents to be executed by its attorney-in-fact this third day of November, 1921.

“KETCHIKAN CONSOLIDATED MINES
CO.

“By CHAS. H. COSGROVE,

“Attorney in Fact.

“Witnesses:

“WILL H. WINSTON.

“J. A. CLARY.

United States of America,

Territory of Alaska,—ss. [85]

“This is to certify that on this third day of November, 1921, before the undersigned, a notary public for Alaska, duly commissioned and sworn, personally appeared Chas. H. Cosgrove, known to me to be the attorney-in-fact of the Ketchikan Consolidated Mines Co., and who acknowledged that he signed and sealed the foregoing instrument as the free act and deed of said Ketchikan Consolidated Mines Co., and he further acknowledged that he was fully authorized to execute the same.

[Seal]

“WILL H. WINSTON,

“Notary Public in and for Alaska.

“My commission expires June 16, 1925.”

Q. Now, in the original of this deed, I notice it was dated 1922 in two places and that you changed that from 1922 to 1921 and put your initials there, is that correct? A. I don't know; I think it is.

Q. And if so—

A. If the same is so, it is.

(Testimony of Will H. Winston.)

Q. You mean, if that is true, that it was a mere clerical error and corrected by you and that was all?

A. Yes.

Q. Now, this deed from the Consolidated Mines Company was accepted and recorded by the city, was it, Mr. Winston?

A. Yes, sir.

Q. Have you got any record of that?

A. Yes, sir.

Q. Can you find that quickly?

A. Yes, sir.

Q. Please do it and read it to the Court. [86]

A. You have the date of acceptance, Judge?

Q. What is that?

A. Haven't you got the date of acceptance in your objections?

Q. Yes, I have.

A. (Reads:) "January 4, 1922. A motion was duly and regularly made and carried that the deed of dedication of Harris Street by the Ketchikan Consolidated Mines Company be accepted and recorded by the city clerk."

Q. What is that from?

A. From the minutes of January 4, 1922.

Q. Minutes of the Council?

A. Common Council, City of Ketchikan.

Q. Now, after this deed was accepted by the city from the Mines Company, there was a new resolution made by the Council, as set out in the pleadings in this case, is that true?

A. I believe so; yes, sir.

Q. Under date of—what date was that? Under the date of December 21, 1921.

(Testimony of Will H. Winston.)

A. No, then; that isn't so.

Q. Isn't it? A. No.

Q. Turn to pages 45 and 46. A. Yes, sir.

Q. What is the fact about that?

A. There is a resolution on December 21, 1921, and this deed was accepted and ordered filed on the 4th of January, 1922.

Q. I didn't ask you about this deed.

A. Yes; you did.

Q. And it was accepted? [87] A. Yes.

Q. Then after the date of it, after the date and delivery of it—it's dated October third?

A. Yes, sir.

Q. When was it delivered to you?

A. I don't remember.

Q. You made those corrections?

A. I think so.

Q. Now, after that, there was a new resolution passed?

A. I don't remember about that. I don't recall.

Q. Well, you recall that was done on the twenty-first day of December, don't you? A. Yes, sir.

Q. We call attention to the record of that.

A. Yes; there was a resolution passed on the twenty-first day of December, but I don't know whether we had the deed at that time or not. I wouldn't swear to it.

Q. But you will swear that you acknowledged it and made those corrections on November third?

A. Yes, sir.

Q. What became of it then?

(Testimony of Will H. Winston.)

A. I don't remember.

Q. Wasn't it left with you and didn't you put it in the city safe? A. I don't remember.

Q. You're sure about that?

A. I know that Mr. Cosgrove and I had some discussion about the description of this property. I know that I had it prior to the time that it was accepted in my office, but just when I had it, I don't know. [88]

Q. Was it exhibited to the members of the City Council? A. It certainly was.

Q. Well, when? A. On January fourth.

Q. Before that? A. No, sir.

Q. You're sure about that?

A. I know it was exhibited to them first.

Q. There was no minutes in the record?

A. No; there was no minutes of record.

Q. How did you come to get that deed?

A. Asked Mr. Cosgrove for it.

Q. Why?

A. Because I thought there would be a question as to the ownership of that land between the street and the creek, and I asked him if he would dedicate that to the city, so there would be no question about it. May I go further into the matter since you asked me the question?

Q. Yes.

A. And that for some years past your client, Mr. Furnivall and Mr. J. C. Barber have been, well, couldn't agree upon whether there was a dedication of a street through this mining claim or not.

(Testimony of Will H. Winston.)

Barber claims there is and Furnivall claims there wasn't. I believe that is the way it was; that was the dispute. So, in order to make sure that there was no dispute on our account, I asked Mr. Cosgrove if he would give the city a dedication of the street, and he did.

Q. Clear into the middle of the creek?

A. Yes, sir.

Q. Now, that was recorded, then? [89]

A. Yes.

Q. By the city? A. Yes, sir.

Q. Did you look up the question of title to the lots, then, beyond the Florida claim, on the public—on the next claim there, that were assessed for this Harris Street, for this Harris Street improvement?

A. Did I look up the title?

Q. Yes. A. What do you mean?

Q. Did you discover whether or not it was patented ground, or whether it was public lands? You were acting as city attorney at that time?

A. Yes; by that time, when it had been surveyed by the Government surveyor.

Q. You are sure about that now?

A. I believe so. I can tell you by referring to your plat here.

Q. Yes; look at the plat. Get the dates when it was authorized. Theile's certificate is in the middle.

A. (Reads:) "Survey commenced April 9, 1921; survey completed May 31, 1921." And at that time it was surveyed.

(Testimony of Will H. Winston.)

Q. When was the improvement made? When was this street built? A. Some time in 1920.

Q. In December, 1920, and January, 1921?

A. Yes.

Q. Prior to this survey?

A. Yes; but you asked me—

Q. (Interrupting.) It doesn't make any difference. Now, then, [90] I want to know whether you looked up the question of whether that was public lands or not at that time.

A. At what time?

Q. At all those dates mentioned just now?

A. It's not public land now; it's patented land now.

Q. Who has the patent?

A. George A. Parks, townsite trustee, from the United States Government.

Q. He is trustee for the purpose of conveying patent title to the other people?

A. Patent lands.

Q. Of giving deeds? A. Yes.

Q. When did he secure that patent?

A. I can't tell you the date without referring to the published notice in the "Chronicle."

Q. Quite recently?

A. No; it isn't quite recently.

Q. Well, how recently?

A. Oh, December or January, I would say.

Q. Of this last year?

A. Of this last year?

Q. Long since all these resolutions were passed?

(Testimony of Will H. Winston.)

A. Oh, no; not long since, because the resolution was passed in December, 1921, and this was patented, the patent was issued some time in December or January.

Q. 1921?

A. December, 1920, or January, 1921.

Q. You are sure about that?

A. No; I said I would have to refer to that published notice, [91] but I believe that is the time.

Q. But at the time when these street assessments were levied upon this property, you did not yet have any authority for conveying title?

A. I don't think so.

Q. Now, have you stated to the Court, Mr. Winston, as fully as you want to, what steps were taken by the City Council to put this lien upon this property belonging to Mrs. Furnivall? If there is any other fact that you think—

A. Well, I think, Judge—

Q. (Interrupting.) It's not argument. I don't want you to argue it.

A. I'm not arguing. I say, I think if there are any other facts, we'll bring them out in our evidence.

Q. Now, do these same facts, with reference to Mrs. Furnivall's property, apply also with equal force to the other objectors' property—each of them?

A. The facts with regard to the records, you mean?

Q. Yes. A. Yes, sir.

(Testimony of Will H. Winston.)

Cross-examination by Mr. SHOUP.

Q. Now, Mr. Winston, is there any property on the south side of this road which has been constructed north of Ketchikan Creek, that is assessable? A. No, sir.

Mr. WICKERSHAM.—Now, we object to that, may it please the Court. There is no such thing in this, in this patent, as Ketchikan Creek. The whole of that land was conveyed to the owners by the patent of the Florida Claim, and while [92] it is true that there is a stream along there, the property all belonged to—

The COURT. (Interrupting.)—It takes in the boundaries of the stream.

Mr. WICKERSHAM.—It is not a meandering stream at all.

Mr. SHOUP.—We want to show that no property on that side could derive any benefit from this.

Mr. WICKERSHAM.—We just want to make our objection.

The COURT.—That is a question of proof. You ask if there is any property to the south of the street—let's see; that is all assessed on the north side. You ask if it is assessable. Now, that is a legal conclusion.

Mr. SHOUP.—No, I was going to follow that up and show why it isn't assessable.

Mr. WICKERSHAM.—We object to that because this witness has nothing whatever to do with it.

The COURT.—He is not passing upon whether

(Testimony of Will H. Winston.)

it is assessable or not. Ask him whether any benefits could be derived from putting this street in.

Mr. WICKERSHAM.—We object to that.

Q. I ask you as to the benefits to be derived—

Mr. WICKERSHAM. (Interrupting.)—This witness can't determine as to that question.

The COURT.—He can testify to that.

Mr. WICKERSHAM.—That is over our objection.

Q. Do you know whether or not any property south of this road north of Ketchikan Creek has been assessed for taxes? A. It has not.

Q. Now, with reference to this protest signed by Mrs. Furnivall, that was made after this work had been done and paid for? A. Yes, sir. [93]

Q. Was it not? A. Yes, sir.

Q. This work was contracted for by the city, was it not? A. Yes, sir.

Q. And bids were made for it?

A. Yes, sir; public notice and call for bids.

Mr. WICKERSHAM.—We object to all this testimony, may it please the Court, because it is immaterial, irrelevant and incompetent and not proper cross-examination.

Mr. SHOUP.—That is proper cross-examination, if your Honor please.

The COURT.—You may answer, subject to the objection.

Q. Now, do you know whether or not the property owners along this street, on the north side of Ketchikan Creek, knew of this contract being let for these

(Testimony of Will H. Winston.)

improvements, and that a contract had been made with the city?

Mr. WICKERSHAM.—We make the same objection—incompetent, immaterial and irrelevant.

The COURT.—It may be received, subject to the objection. A. Yes.

The COURT.—Do you know whether they all knew?

A. Yes, sir; I know that they did know—all of them.

Q. Now, this last resolution that Judge Wickersham called your attention to, dated December 21, 1922, that was simply a recheck, was it not, of the former resolution?

Mr. WICKERSHAM.—I object to that. The resolution shows and it's the best evidence.

Mr. SHOUP.—The resolution isn't in evidence. You asked him in regard to this resolution.

Mr. WICKERSHAM.—Well, it is admitted in the pleadings. [94]

Q. Did the City Council consider this property on the south side of the creek of any value?

Mr. WICKERSHAM.—That is objected to for the same reason—incompetent, irrelevant and immaterial. The City Council's records are the only records that can be appealed to in this case.

The COURT.—It seems so to me, but he may answer, subject to being stricken.

A. The City Council took the matter under consideration and decided that the property on the south side could not be assessed; that it was of no value.

(Testimony of Will H. Winston.)

You allege that in your objections, that it is of no value.

Mr. WICKERSHAM.—You're mistaken about that. I merely allege that the *scrip* you got from Charley Cosgrove was of no value.

Mr. SHOUP.—That's all.

Redirect Examination By Mr. WICKERSHAM.

Q. You say the City Council did that—when and where? Is there any record of it anywhere?

A. It would be absolutely impossible for me to take down every word that is spoken at a council meeting.

Q. I appreciate that.

A. But I know positively that the Council took it into consideration.

Q. Did they make any finding, or make any record of it anywhere? A. Yes, sir. [95]

Q. Where?

A. When they passed the resolution.

Q. And the resolution is the only record they made? A. That is the only record.

Recross-examination By Mr. SHOUP.

Q. What is the character of this land between the road and Ketchikan Creek?

A. It is a very narrow strip of land, running from nothing to a few feet in width. At places there is no land at all; at other places there are a few feet, and the idea was to cover the entire—

Mr. WICKERSHAM. (Interrupting.)—Just wait a moment. Answer the question.

Q. What is this paper, Mr. Winston (handing paper to witness)?

A. That is a drawing made by the city engineer.

Q. That shows where the street runs?

A. Yes, sir.

Q. And the land between the street and the creek, does it not? A. Yes, sir.

Mr. WICKERSHAM.—You going to offer that in evidence?

Mr. SHOUP.—No, I won't.

Mr. WICKERSHAM.—Well, I would like for the Court to look at this very carefully and see the extent of the land lying between that and the creek.

Mr. SHOUP.—Well, we're willing to have it introduced in evidence, with the privilege of withdrawing it.

The COURT.—You can get a blue-print of it.

The WITNESS.—That's our original drawing.
[96]

Mr. WICKERSHAM.—But, we'd like to have it understood that there should be an exact blue-print put of it into the record.

The COURT.—You can exchange it and have a blue-print put in.

(Whereupon said drawing was received in evidence and marked objector's exhibit.)

Mr. SHOUP.—I believe that's all.

Mr. WICKERSHAM.—That's all.

(Witness excused.)

Testimony of J. M. Peterson, for Objectors.

J. M. PETERSON, one of the objectors herein, called as a witness on behalf of the objectors, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination By Mr. WICKERSHAM.

Q. State your name? A. J. M. Peterson.

Q. You're the other objector in this case?

A. Yes, sir.

Q. What land do you own over on Harris street extension, Mr. Peterson?

A. I think it is 2; I'm not sure.

Q. Is it between the two lots owned by Mrs. Furnivall? A. Yes, sir.

Q. From whom did you purchase your lots?

A. From Mrs. Furnivall?

Q. In what way? A. By a contract.

Q. Have you paid for it yet and got a deed?

A. Not yet; no, sir.

Q. Through whom do you make your payments?

A. Through the Miners' & Merchants' Bank, to Mrs. Furnivall.

Mr. WICKERSHAM.—I think that's all. [97]

Mr. SHOUP.—That's all. I desire to make a motion now.

The COURT.—I'll hear your motion.

Mr. SHOUP.—Now comes the defendant and moves for a judgment of nonsuit, on the ground that no evidence has been introduced by the objector that is material to any issue in this proceeding. There is no evidence at all produced, to show that

(Testimony of J. M. Peterson.)

two-thirds of the owners of this property, in value, did not sign this petition. The only thing that has been relied on at all, that I can see, is these lots—that there is some property south of the street that has not been assessed, but I can't see any evidence now that has been introduced that could set aside this assessment. The matter of the name cuts no figure whatever, in whose name it is assessed. This is assessed by the Council; not by the City Assessor, but by the City Council, in the name of Mary M. Furnivall. I contend that that makes no difference whatever, and that this is a lien on the property. This procedure is in the nature of an action *in rem*, and it makes no difference whatever who the owner of the property is. Besides, Mrs. Furnivall has admitted by her pleadings that she is the owner of this property, and I contend that there has been no evidence at all introduced upon which this court can set aside this assessment. It was assessed regularly and according to form in every way, and while the objector has stated that it was not and some question in regard to the jurisdiction of the court is raised, I can see nothing whatever in the evidence.

I therefore think we are entitled to a judgment of nonsuit in this case. [98]

Mr. WICKERSHAM.—Well, I suppose the evidence is all in, and that raises the whole question before the Court.

The COURT.—I don't know whether they are go-

(Testimony of J. M. Peterson.)

ing to introduce any evidence on the other side. I'll deny the motion.

Mr. SHOUP.—Yes; we want to introduce some evidence. I note an exception to the overruling of the motion.

No other or additional testimony was offered by either said City or by said Objectors, or either of them.

Whereupon the Court, after argument, took the matter under advisement and after the term had adjourned and on, to wit: July 22, 1922, at the subsequent term at Juneau, delivered its written opinion herein, and caused the same to be filed with the Clerk at Ketchikan, which Court was not in session there.

And on October 5, 1922, after the adjournment of the term at which the trial was held and during the subsequent Juneau term, the Court made its findings of fact and caused the same to be filed with the Clerk at Ketchikan on the 5th day of October, 1922, the Court not being then in session at Ketchikan.

Said findings of fact and conclusions of law are and were as follows:

In the District Court for the Territory of Alaska,
Division No. One, at Ketchikan.

No. 537—KA.

In the Matter of the Delinquent Tax Roll for the
CITY OF KETCHIKAN,

vs.

MARY M. FURNIVALL,

Objector.

Findings of Fact and Conclusions of Law.

This cause having come regularly on for trial on the third day of June, 1922, on the pleadings theretofore filed herein, and said cause having been tried before the Court without a jury on said day, James Wickersham, Esq., appearing for the objector, and James M. Shoup, Esq., and Will H. Winston, Esq., appearing for the City of Ketchikan, and after hearing [102] the allegations and proofs of the parties, the arguments of counsel, and being advised in the premises, and having taken the matter under advisement, now on this, the fifth day of October, 1922, at Juneau, Alaska, the Court hereby makes and files its findings of fact and conclusions of law in said cause, as follows:

FINDINGS OF FACT.

1. That Mary M. Furnivall, at the time of filing in this Court of the Delinquent Tax Roll of the City of Ketchikan for that certain street improvement known as Harris Street Extension in said

Ketchikan, was entitled to the possessory title to lots No. 1 and 3 in block No. 3, Townsite Addition to the City of Ketchikan, Alaska; that said Mary M. Furnivall is the owner of lot 11 in block E, Schoenbar Addition to the City of Ketchikan, Alaska.

2. That at all the times mentioned in the objection filed herein by Mary M. Furnivall, and the said Delinquent Tax Roll of the City of Ketchikan, Alaska, and in the proceedings before its City Council in relation to the extension of the said Harris Street, upon which the claim of tax in said Delinquent Tax Roll is made by said City of Ketchikan, Alaska, against said property of this objector, the City of Ketchikan was an incorporated town or city, within the Territory of Alaska.

3. That on September 7, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan aforesaid, a petition in writing, asking for the construction of an extension of the said Harris Street at the expense of the property owners thereon, and the City of Ketchikan; that on October 5, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan, aforesaid, a petition in writing asking for the construction of an extension of the said Harris Street, at the expense of the property owners thereon, and the City of [103] Ketchikan; and that Mary M. Furnivall, objector herein, was not a party to either of said petitions, or any other document or agreement authorizing or creating a lien, or other-

wise permitting the creation of a lien upon her property.

4. That prior to the completion of the improvement of the Harris Street Extension, no action was taken by the City Council of the City of Ketchikan, Alaska, as provided by law, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon; no notice was served upon this objector of any proposed improvement of such street; no finding that the owners of two-thirds in value of the property whose property abuts the improvement on said Harris Street Extension had petitioned the City Council of the City of Ketchikan therefor was ever made by said City Council; no ordinance or resolution to construct or improve said street and assess the abutting owners for two-thirds the cost thereof, or any other portion of such cost, was ever made or passed by said Council in connection with the improvement of said Harris Street Extension.

5. That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris Street Extension as aforesaid, was the adoption at a regular meeting of said council on December 21, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon, and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax had not been paid.

CONCLUSIONS OF LAW.

1. That the possessory right and title to lots 1 and 3 in block 3, Townsite Addition to the City of Ketchikan, Alaska, is in Mary M. Furnivall; that Mary M. Furnivall is the owner of lot 3 in block E, Schoenbar Addition to the City of [104] Ketchikan, Alaska.

2. That the action of the City Council of the City of Ketchikan, in levying on and assessing the above described property of Mary M. Furnivall for the improvement of the Harris Street Extension in the City of Ketchikan was and is irregular and illegal, without authority of law, and null and void.

3. Upon the evidence and the law in this cause, the objections of Mary M. Furnivall to the delinquent tax roll of the City of Ketchikan heretofore filed in this cause against property of which she has the possessory or legal title are sustained, and the order of sale of such property will be denied, and the objector is entitled to her costs of action by her in this behalf expended, to be taxed by the Clerk of this Court.

Dated at Juneau, Alaska, this fifth day of October, 1922.

THOMAS M. REED,

District Judge.

Thereafter, on November 13, 1922, the City of Ketchikan filed, with the Clerk of the Court at Ketchikan, its motion for an order to set aside the findings and decree, as follows:

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

No. 537—KA.

In the Matter of the DELINQUENT TAX ROLL
for the City of Ketchikan and the Applica-
tion for an Order of Sale Thereon.

Motion for Order to Set Aside Findings and Decree.

Comes now Will H. Winston, Attorney for the City of Ketchikan, and moves this Court for an order setting aside the findings of fact and conclusions of law and decree heretofore filed herein for the following reasons:

That the City of Ketchikan herein had no notice of the proposed findings and decree for the reason that a copy of said findings was mailed to one James M. Shoup, Esq., who had [105] formerly been retained in the above-entitled case, but who had been retained to assist only with the trial of the said cause and who had been paid for such services and was no longer retained by the City of Ketchikan and with whom the relationship of attorney and client did not exist as the same had ceased on June 21, 1922, at which time the said relationship was severed.

That the said Shoup did not notify the said City of Ketchikan or any of its employees or officers that he had received the said findings and decree and that the first knowledge that the City of Ketchikan or any of its employees had of such pro-

posed findings and decree was on the 25th day of October, 1922, when the same were discovered in the files in this case. That the reason that the said City of Ketchikan herein desires the findings and decree herein set aside is to enable the said City of Ketchikan to file proper exceptions thereto and that setting aside the said findings and decree cannot injure or prejudice the rights of the objectors herein, but can and does prevent the said City of Ketchikan from further proceedings herein. That attached hereto and made a part hereof is the affidavit of Will H. Winston.

WILL H. WINSTON,
Attorney for City of Ketchikan.

Affidavit of Will H. Winston.

United States of America,
Territory of Alaska,—ss.

Will H. Winston, being first duly sworn on oath, deposes and says that he is the attorney for the City of Ketchikan in the foregoing cause; that the City of Ketchikan retained one James M. Shoup, Esq., to assist him in the trial of the foregoing cause; that the said Shoup was paid off by the City of Ketchikan on the 21st day [106] of June, 1922, and he thereupon dropped out of the said case and was no longer an attorney therein; that on the 25th day of October, 1922, this affiant was searching the record herein and discovered the findings of fact and conclusions of law and decree signed and filed herein; that thereon this affiant called the said Shoup on the telephone and the said

Shoup advised this affiant that the only papers he had received was a copy of the memorandum opinion that this affiant had handed him; that thereupon this affiant informed the said Shoup that he had signed the original findings and decree and the said Shoup said that he did not know it; that thereupon this affiant went to the office of the said Shoup and the said Shoup again said that the only papers that he had received was the memorandum opinion that this affiant had given him; that thereupon the said Shoup discovered a letter that he had from Judge Wickersham, one of the attorneys herein, and this affiant told the said Shoup that the letter showed that he had received the said findings and decree and the said Shoup thereupon told this affiant that he did not know anything about it and thought that the papers were the same as this affiant had handed him, namely, the memorandum opinion.

That this affiant thereupon advised counsel for the City of Ketchikan in San Francisco and as a result, the foregoing motion is filed herein.

[Seal]

WILL H. WINSTON.

Subscribed and sworn to before me this 13th day of November, 1922.

MYRTLE D. MORRISSEY,

Deputy Clerk, U. S. District Court.

Filed in the District Court, District of Alaska, November 13, 1922. Jno. H. Dunn. By M. D. Morrissey, Deputy.

And thereupon the objectors, by their attorney James Wickersham, filed the following affidavits:

In the District Court for the Territory of Alaska,
Division No One, at Ketchikan. [110]

No. 537—KA.

MARY M. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation,
Defendant.

United States of America,
Territory of Alaska,
City of Ketchikan,—ss.

Affidavit of James Wickersham.

James Wickersham, being first duly sworn, deposes and says:

That he is the attorney for the above-named objector in the matter of objection to the Delinquent Tax Roll of the City of Ketchikan; that this cause was tried in this Court at Ketchikan; that this cause was tried in this Court at Ketchikan, Alaska, on or about the third day of June, 1922, and was by the Court taken under advisement, and the Court rendered an opinion upon the law in respect thereto some time in July, 1922; that soon thereafter, and on the eighth day of August, 1922, this affiant prepared proposed findings of fact, conclusions of law and decree in the case, and on the eighth day of August, 1922, forwarded the original and a full complete copy thereof to J. M. Shoup,

Esquire, one of the attorneys for the City of Ketchikan in the said suit, directed to him by mail at Ketchikan, Alaska, and with the said proposed findings of fact, conclusions and decree forwarded a letter, of which the following is a true and correct copy:

Juneau, Alaska, August 8, 1922.

J. M. Shoup, Esq.,
Ketchikan, Alaska.

Dear Mr. Shoup:

We send you herewith originals and copies of findings of fact and conclusions of law and decrees in the Ketchikan Tax Roll cases of Mary M. Furnivall and J. M. Peterson [111] which we wish you would go over carefully and O. K. and return to us for filing.

The extra copies of these papers are, of course, for your own files.

Very sincerely,

WICKERSHAM & KEHOE.

By JAMES WICKERSHAM.

That affiant did not receive any answer to said letter, nor a return of the originals as requested in the letter of August 8, 1922, and, being in Ketchikan, Alaska, some time in September, 1922, called at the office of J. M. Shoup, Esq., in the Miners & Merchants Bank Building at Ketchikan, Alaska, and had a conversation with Mr. Shoup; that affiant inquired about the letter and findings aforesaid, and Mr. Shoup seemed uncertain about them, but opened one of the drawers in his desk

and found affiant's letter and the copies and spread them out on his desk before affiant. I asked him then and there to acknowledge service in writing upon the originals, which he did by writing fully upon the original proposed decree in each case an acknowledgment of service of a copy, to which he signed his name. Thereupon he delivered the originals to me and I took them back to Juneau with me, and at a later date, the date of their signature by Judge Reed, I presented them to Judge Reed with Mr. Shoup's acknowledgment of service thereon, and they were signed by the Judge and filed and entered of record in each of the causes.

I have read the affidavit of Will H. Winston, one of the attorneys in the said causes for the City of Ketchikan, and in answer thereto I say that I did not have any notice or information, or even a suspicion that Mr. Shoup was not, as he had theretofore been, an attorney for the City of Ketchikan in [112] the said causes. I have examined the papers in both of said causes and I do not find therein any withdrawal of Mr. Shoup's name as attorney in either case, and I had no notice thereof if there was ever any such withdrawal.

Affiant resides in Juneau, where affiant presented the said proposed findings, conclusions and decree to Judge Reed for signature, long after he had rendered his opinion in both of said causes at Juneau. The first intimation that affiant had that there was any question about Mr. Shoup's right to represent the City of Ketchikan in the said causes was when

Judge Reed exhibited to affiant a copy of a telegram, a night letter, dated November 13, 1922, addressed to Judge Reed, and signed by Will H. Winston, one of the attorneys for the City of Ketchikan, in which he then advised Judge Reed that Mr. Shoup had been paid by the City and was not the City's attorney.

That upon the signature of the District Judge to the findings of fact, conclusions of law and decree, on the day they bear date, the same were immediately filed with the Clerk of the District Court in and for the First Division of the Territory of Alaska, at Juneau, Alaska, and have ever since remained in the possession of the Clerk.

Affiant is informed and believes, and therefore states that the original letter written by affiant to Mr. Shoup, on August 8, 1922, together with the copies of the findings of fact, conclusions of law and decree in both of said causes were delivered by Mr. Shoup to Will H. Winston, and that Mr. Winston is now in possession thereof.

[Seal]

JAMES WICKERSHAM.

Subscribed and sworn to before me this 24th day of November, 1922.

J. A. CLARY,

Notary Public in and for Alaska.

My Commission expires February 14, 1926. [113]

Filed in the District Court, District of Alaska, First Division, November 24, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

In the District Court for the Territory of Alaska
Division No. One, at Ketchikan.

No. 537—KA.

In the Matter of the DELINQUENT TAX ROLL,
Ketchikan, Alaska.

MARY M. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN.

**Exceptions to Findings of Fact and Conclusions of
Law.**

Comes now the City of Ketchikan, and at the time of filing the findings and conclusions herein, excepts to the findings of fact and conclusions of law this day made by the Court herein, as follows:

1. Said City of Ketchikan excepts to finding contained in paragraph No. 4 of the finding of fact herein "That prior to the completion of the improvement of the Harris street extension no action was taken by the City Council of the City of Ketchikan, Alaska, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon." [117]

This exception is for the reason that no such objection is contained in the written objections on file herein or before the Court, and the Court had no power or jurisdiction to consider any objection not so stated in writing: And for the further reason

that there is no evidence to support said finding and same is against the law and the evidence therein.

2. Said City of Ketchikan excepts to finding contained in paragraph No. 4 of the findings of fact herein that "No finding that the owners of two-thirds in value of the property whose property abuts the improvement of said Harris street extension had petitioned the City Council of the City of Ketchikan, therefor, was ever made by the said City Council.

This exception is for the reason that no such objection is contained in the objections on file herein or before the Court, and that the Court had no power or jurisdiction to consider any objections not so stated in writing; and for the further reason that the law does not require any such finding to be made by said City Council; and for the further reason that there is no evidence to sustain such finding by the Court and the same is against the law and against the evidence herein.

3. Said City of Ketchikan excepts to the finding contained in said paragraph No. 4 of the findings of fact herein "That no ordinance or resolution to construct or improve said street and assess the abutting owners for two-thirds of the cost thereof, or any portion of such cost, was ever made by said Council in connection with the improvement of said Harris Street Extension."

This exception is for the reason that no such objection is contained in the objections on file herein or before the [118] Court, and the Court had no power or jurisdiction to consider any objection not

so stated in writing; and for the further reason that no such ordinance or resolution is required; and for the further reason that said finding is against the law and the evidence herein.

4. Said City of Ketchikan excepts to the finding contained in paragraph 5 of the findings of fact herein "That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris Street Extension, as aforesaid, was the adoption at a regular meeting of said Council on December 21-, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon, and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax has not been paid."

This exception is for the reason that no such objection is contained in the objections on file herein or before the Court and the Court had no power or jurisdiction to consider any objections not so stated in writing; and for the further reason that said finding is against the law and the evidence herein.

5. Said City of Ketchikan excepts to the conclusion of law contained in the second paragraph of conclusions of law herein, "That said action of said Council is irregular and illegal and without authority of law and null and void."

This exception is for the reason that said conclusion of law does not flow from the facts found, but that the only conclusions of law which does flow from said facts is the conclusion that none of the

objections stated in writing and so before the Court has been sustained. [119]

6. Said City of Ketchikan excepts to the conclusion of law contained in the third paragraph of conclusions of law herein, "That the order of sale should be denied and that the objector is entitled to her costs."

This exception is for the reason that the only conclusion of law flowing from the facts found is the conclusion that the objections made are not sustained and that the same should be dismissed, and that the City is entitled to its costs and to an order of sale, as prayed for.

Dated at Ketchikan, Alaska, November 25, 1922.

WILL H. WINSTON,

Attorney for the City of Ketchikan.

Filed in the District Court, District of Alaska, First Division, Nov. 25, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Whereupon said City of Ketchikan requested the Court to make findings as follows:

In the United States District Court for Alaska.

No. 537—KA.

In the Matter of the DELINQUENT TAX ROLL
of Ketchikan, Alaska.

J. M. PETERSON,

Objector,

vs.

CITY OF KETCHIKAN.

**Findings and Conclusions and Decree Asked for by
City of Ketchikan.**

Comes now the City of Ketchikan and proposes the following findings of fact, conclusions of law and decree, and requests the Court to make and enter the same herein: [120]

FINDINGS AND CONCLUSIONS.

This cause came on regularly to be heard on the third day of June, 1922, on said delinquent tax roll, and the written objections thereto heretofore filed herein. The objector was represented by James Wickersham, Esq., and the City of Ketchikan by Will H. Winston, City Attorney, and by James M. Shoup, Esq. Evidence was heard, argument had and the matter duly submitted, and the Court having duly considered same, doth make the following

FINDINGS OF FACT.

1. The City of Ketchikan introduced its delinquent tax roll and its application for adjustment and order of sale, duly filed herein.

2. There was no evidence that the owners of two-thirds in value of the property abutting upon and affected by the proposed Harris street extension had not petitioned therefor.

3. There was no evidence in support of any of the other written objections filed herein, except the objection that the title to the property claimed by objector was in the United States Government.

4. I find that the title to said property was in the United States Government, but I also find that the

objector was in possession of same and claimed in his objections and in the evidence to be and was and is the possessory owner thereof.

As conclusion of law flowing from the facts found, I find.

1. That each of said written objections should be overruled.

2. That the City of Ketchikan is entitled to an Order of sale, as prayed for. [121]

DECREE.

WHEREFORE, it is ordered, adjudged and decreed that each and all of said objections be and the same is hereby overruled, and that an order of sale of the delinquent property as per said duplicate assessment-roll on file herein be issued as prayed for.

Filed in the District Court, District of Alaska, First Division, Nov. 25, 1922. ————— Clerk. By ————— Deputy.

In the United States District Court for Alaska.
No. 537—KA.

In the Matter of the DELINQUENT TAX ROLL
of Ketchikan, Alaska,
MARY M. FURNIVALL.

Objector,

vs.

CITY OF KETCHIKAN.

Findings and Conclusions and Decree Asked for by the City of Ketchikan.

Comes now the City of Ketchikan and proposes the following findings of fact, conclusions of law and decree, and requests the Court to make and enter the same herein:

FINDINGS AND CONCLUSIONS.

This cause came on regularly to be heard on the third day of June, 1922, on said Delinquent Tax Roll, and the written objections thereto heretofore filed herein. The objector was represented by James Wickersham, Esq., and the City of Ketchikan, by Will H. Winston, City Attorney, and by James M. Shoup, Esq. Evidence was heard, argument had and the matter duly submitted; and the Court having duly considered same, doth make the following

FINDINGS OF FACT. [122]

1. The City of Ketchikan introduced its delinquent tax roll, and its application for adjustment and order of sale, duly filed herein.

2. There was no evidence that the owners of two-thirds in value of the property abutting upon and affected by the proposed Harris street extension had not petitioned therefor.

3. There was no evidence in support of any of the other written objections filed herein, except the objection that the title to the property claimed by objector was in the United States Government.

4. I find that the title to said property was in the United States Government, but I also find that

the objector was in possession of same and claimed in his objections and in the evidence to be and was and is the possessory owner thereof.

As conclusions of law flowing from the facts found, I find:

1. That each of said written objections should be overruled.

2. That the City of Ketchikan is entitled to an order of sale, as prayed for.

DECREE.

WHEREFORE, it is ordered, adjudged and decreed that each and all of said objections be and the same is hereby overruled, and that an order of sale of the delinquent property as per said duplicate assessment roll on file herein be issued as prayed for.

Filed in the District Court, District of Alaska, First Division, No. 25, 1922, ————— Clerk. By —————, Deputy.

But the Court refused to make any of said findings or conclusions to which refusal, in each instance, the said City of Ketchikan duly excepted.

Whereupon the Court entered its final decree herein,

Judge's Certificate.

I hereby certify that I am the judge by and before whom the above-entitled cause was tried and that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and [123] proceedings had therein, and that it contains

the evidence and all the evidence heard or considered at said trial.

I also certify that the said bill of exceptions was duly presented and filed within the period allowed by the extension of time granted under the law and the rules of this Court.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this Court, allow and settle same, and order it to be filed and to become a part of the records of this cause.

Dated at Ketchikan, Alaska, this 20th day of March, 1923.

THOS. M. REED,
District Judge.

In the District Court for the Territory of Alaska
Division Number One, at Ketchikan.

No. 537—KA.

In the Matter of the DELINQUENT TAX ROLL
for the City of Ketchikan.

Memorandum of Opinion.

On May 20, 1922, the delinquent assessment tax roll of the City of Ketchikan for the year 1921 was presented under the provisions of chapter 69 of the Session Laws of Alaska, 1913, for adjustment and order of sale of the property therein described. At the same time there were presented several delinquent special assessment-rolls for improvements made by the City under subdivision 4, Section

627, Compiled Laws of Alaska, 1913, and an application that an order of sale be entered of the property mentioned therein as abutting on the respective improvements.

No objections were made to the general delinquent tax roll of 1921, and an order of sale was directed to issue, as provided by the statute for the properties therein described on which the tax was delinquent; but objections were interposed to two of the special [124] assessments and the regularity of the whole proceeding leading up to the special assessment was vigorously assailed by counsel for the objectors.

The first of these special assessments to which objection was interposed is what is called the "Haris street extension" or "North Harris street" assessment, and the second is what is commonly known as the "Bawden street sewer assessment, and while the objections in each case are in most respects similar, yet the facts involved are so dissimilar that each assessment must receive a separate consideration.

HARRIS STREET EXTENSION ASSESSMENT.

The objections to the assessment for this improvement are presented by Mary M. Furnivall, claiming to be the owner of the right of purchase under the Townsite Act (26 Stat. L., 1095) of lots 1 and 3 of block 3 of the United States Government Addition to the Townsite of Ketchikan and lot 11, block E of the Schoenbar Addition to the City, and J. M. Peterson who claims to have the preference right

of purchase under the Townsite Act aforesaid to lot 2 of block 3 of the Townsite addition.

The objections presented include questions both of law and of fact and are in effect: That two-thirds of the abutting owners in value along the line of the improvement did not petition therefor as required by subdivision 4, section 627, Compiled Laws of Alaska; that no finding was made by the Common Council to the effect that two-thirds of the owners in value along the line of the proposed improvement had petitioned therefor; that no ordinance or resolution was adopted by the Common Council, providing for such improvement and assessment against the abutting owners; that the property in block 3 so assessed and owned or claimed by the objectors is the property of the United States, and therefore the land is not assessable; that the right of purchase claimed by objectors under the Townsite Act of the United [125] States is a personal right and not a right in the property, and is, therefore, not assessable; that the assessment is not levied on all the property abutting on the proposed improvement but only against property on the north side of the line of the improvement, nor was the assessment made according to benefits to or according to the value of the abutting property, nor was it made according to the front footage of the property abutting on the proposed improvement, but was an arbitrary assessment without regard to the value of the property or the front footage along the improvement and that at no time were the objectors af-

forded an opportunity to object to or protest against the improvement referred to or to the assessment.

The Harris Street Extension, so called, is a causeway largely built on pilong along the north bank of Ketchikan Creek and follows closely the meandering of that stream. The street at intervals extends over the stream bed, and some of the property on the north side of the extension has for a number of years been occupied as homes by residents of the City while that on the south side of the improvement is either in the stream bed or along a steep bluff, the side or bank of the creek.

It appears from the testimony that a number of years since the land through which the Harris street extension is established, was located as a mining claim and in the course of the improvement and operation of the mining property, one Schoenbar constructed a tramway along the north bank of Ketchikan Creek and practically along the line where the extension is now situated, for the purpose of transportation of ores and supplies to and from the mining property. This tram was used by the public as a means of travel and a number of people settled on the mining claim and built their homes on the north side of the tramway. In the course of time the tramway became out of repair and a number of the residents along the line thereof [126] petitioned the City Council of Ketchikan to improve the tramway by constructing a street from the intersection of Harris Street along the north side of Ketchikan Creek to the city limits of the mean width of twenty feet. This peti-

tion was filed with the City Council on January 15, 1919, but no action was taken thereon. On September 2, 1920, a second petition for improvement was filed with the City Council, praying that a temporary street be constructed and maintained for vehicle passage sixteen feet in width, with a four-foot sidewalk following the course of and upon the right of way of the Schoenbar tram. This petition was filed with the City Council, but no action was taken thereon. It appears that J. M. Peterson, one of the objectors signed this petition. On October 5, 1920, a third petition was filed, praying the City Council "to construct a sixteen-foot plank roadway and a four-foot sidewalk, and to lay out and establish a forty-foot right of way from present Harris street in front of the Parker House to and past the Harry Smith House, or to the city limits." The petitioners therein agreed to pay the City of Ketchikan their proportionate shares of two-thirds of the cost of the improvement and that such sums should be a lien on their respective properties. This petition was signed by eight persons—all, as appears from the testimony, residents along the north side of the proposed improvements. There were no petitioners residents or owners of property on the south side of the street. The objectors, Mary A. Furnivall and J. M. Peterson did not sign this petition. This petition was filed with, and approved by, the City Council on October 5, 1920.

There is no affirmative action appearing of record relative to the petition of October 5, 1920, although

some action must have been taken thereon, since the City Engineer made a survey of the proposed improvement about that time and a causeway or street was constructed in accordance with plans prepared and furnished by him.

Thereafter, the City Council, at its regular meeting on February [127] 2, 1921, adopted a resolution assessing the real property and possessory rights of certain named persons, according to their respective alleged front footage on the northern side of and along the line of said improvement for two-thirds of the cost thereof, and provided that such assessment should be a lien on the property, payable in ten days.

No assessment was made against the property abutting on the south side of the improvement.

J. M. Peterson was one of the persons named and J. W. Furnivall was also assessed—F. J. Furnivall being the husband of Mary M. Furnivall, the objector.

On February 2, 1921, a protest was filed against said assessment by the objectors J. M. Peterson, Mary M. Furnivall and others, alleging that all the abutting owners had not been assessed and that the petition under which the work was carried out had not the support of sufficient interest. This protest, or remonstrance, was laid on the table on March 2, 1921.

It appears that in the year 1908, an application for patent from the United States was made before the United States Land Office for the mining claims over which the Schoenbar tram was con-

structed and a certificate for patent was issued for the Florida claim, being that part of the land over which the westerly part of the tram had been constructed; while the easterly, or upper part of the tram ran over another mining claim, which was not patented, and the land therein included reverted to the United States, free from any mining claim. Lot 11 of block E, assessed to Mary M. Furnivall, is a part of the Florida claim, while lots 1, 2 and 3 of block 3, assessed to Mary M. Furnivall and J. M. Peterson, are a part of the other claim reverting to the Government of the United States, and at the time the petition of October 5, 1920, was filed with the City Council, and at the times of the subsequent improvement and assessment no street had been laid out over this claim, nor was the property laid out into lots and blocks. [128] Whether Mary M. Furnivall was the owner of lot 11, block E of what appears now to be the Schoenbar Addition at this time does not appear from the testimony except that in 1918 she succeeded to the rights of F. J. Furnivall thereto. It appears from the testimony that on April 15, 1921, a part of the Florida Mining Claim was surveyed into lots and blocks, streets and alleys as the Schoenbar Addition to the City of Ketchikan and on the plat thereof is shown what is called "North Harris Street," a street from thirty to thirty-two feet in width and extending along the line of the old Schoenbar tram from the southerly side line to the easterly end line of the Florida Claim. Whether or not the streets or alleys set forth on the plat had been formerly dedi-

cated to the public is not shown by the testimony, but lot 11, block E, claimed by Mary M. Furnivall, is shown thereon as having a front footage of 37.39 feet on North Harris Street.

On May 31, 1921, The Government completed U. S. Survey No. 1381, which comprised part of the public domain formerly included in the abandoned mining claim hereinbefore referred to. This survey was made under the provisions of the Act of March 3, 1891, known as the Townsite Act (26 Stat. L, 1095) and the survey so made, laid out the property included therein into streets, alleys, lots and blocks and is known as the "Ketchikan Townsite Addition" Lots 1, 2 and 3 of block 3 are shown thereon,—lot 2 (claimed by Peterson) having a frontage of 34 feet, and lots 1 and 3 (claimed by Mary M. Furnivall) having a frontage of 42 feet and 92.68 feet respectively on the street therein designated as North Harris Street, being the same street known as the Harris Street Extension. It is shown by the evidence that the title to the three lots in this addition had not, at the time of the hearing before the Court, been conveyed by the townsite trustee to private owners; hence at the time of the hearing before the Court, no title to the lots in the Ketchikan [129] Townsite Addition was in Peterson or in Mary M. Furnivall, but was still in the United States, the claims of Peterson and Mrs. Furnivall being merely a preference right of purchase because of occupancy of the land.

On November 5, 1921, the Ketchikan Consolidated Mines Company executed a deed of right of way

for a public road over a portion of the Florida Mining Claim covering "a strip of ground beginning at the southerly end of Harris Street, so called, where it enters the Florida Mining Claim and continuing across said Florida Mining Claim, with a width bounded by the westerly side of said street, as platted by Joseph Ulmer, C. E., on the one side and the middle of Ketchikan Creek on the easterly side." By this deed, an easement for right of way following the line of North Harris Street of a varying width was conveyed to the City, but the fee still remained in the grantor.

Thereafter, on December 21, 1921, the City Council, at a regular meeting, adopted the following resolution assessing the property along the Harris Street Extension for the improvement thereof:

RESOLUTION.

Be it Resolved by the Common Council of the City of Ketchikan, Alaska; That, whereas a recheck has been made of assessment levied against the property owners fronting on Harris Street in said City and whereas such recheck has been made in accordance with established property lines fronting on said street.

It is hereby resolved by the Common Council that the resolution heretofore hereby made on the 2d day of February, 1921, be and the same is hereby repealed and set aside, said resolution levying assessments against the property owners and property abutting on Harris Street.

And it is hereby Resolved that the several sums set after the name of certain persons and the real

property owners, or occupied by them under possessory rights or otherwise, which property abuts on the Harris Street Extension in the City of Ketchikan, Alaska, be and the said sums are hereby assessed against said persons and said land owned or occupied by them as aforesaid, for two-thirds ($\frac{2}{3}$) of the expense of the construction of said street, the number of front feet of property abutting upon said improvement is hereinafter more fully set forth. [130]

F. J. Furnivall	92.58 ft. frontage	\$353.10
J. M. Peterson	34 do	129.50
F. J. Furnivall	42 do	160.00
F. J. Furnivall	37.79 do	144.00

Be it further Resolved, that the foregoing sums so assessed against said persons and said land abutting thereon as above set forth, be and the same are hereby made a specific lien upon said land; and such assessments shall become due and payable to the City Treasurer of the City of Ketchikan immediately upon the adoption and approval hereof and from and after January 1, 1922, the same shall bear interest at the rate of 8 per cent per annum and said interest shall be a lien on said property abutting on said improvement. And the collection of such assessments may be enforced by suit or collected in the same manner as other delinquent taxes.

And it is further resolved that all payments made on the former assessment roll shall be applied towards the payment of the above assessments.

Thereafter the City Council caused to be published a notice of application to the Court for an order of sale of the property so assessed, on which the tax had not been paid. Lot 11, block E, Schoenbar Addition and lots 1, 2 and 3, block 3, Townsite Addition assessed to J. M. Peterson and F. J. Furnivall, appear as part of this property.

From the testimony it appears that at the time of the filing of the petition on which the improvement was made, there was no street dedicated to the public use on which the improvement so proposed was to be constructed; that no ordinance or resolution was adopted by the City Council opening up a street or authorizing the improvement specified; that no finding was made by the City Council that two-thirds of the owners of property in value affected by or abutting on the proposed improvement had signed a petition therefor; that it further appears that two-thirds of the owners in value of property along the line of the proposed improvement did not petition therefor and that the objectors, Mary A. Furnivall and J. M. Peterson did not petition for the improvement. It further appears that when the assessment of December 3, 1921, was made, the title to the land in the Government townsite addition had not passed from the United States. [131]

Subdivision 4 of section 627 of the Compiled Laws of Alaska, provide that the Common Council of the City shall have power to provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks and

sewers, and if such street, alley, sidewalk or sewer, or part thereof, is located or constructed upon the petition of the owners of two-thirds in value of the property abutting on and affected by such improvement, then two-thirds of the cost of the same may, in the discretion of the Council, be collected by the assessment and levy of a tax against abutting property and such tax shall be a lien on the same and may be collected as other real estate taxes are collected.

Section 628 provides that the Common Council may exercise their powers by ordinance or resolution, but no ordinance or resolution shall be valid unless adopted by a vote of four members of the council at a meeting where five are present.

Subdivision 14 of Section 627 provides that the Common Council may take such action by ordinance, resolution or otherwise as may be necessary to protect and preserve the lives, health, safety and well-doing of the people of the town and to publish all ordinances.

The statute authorizing the opening up and improvement of streets and assessing the cost thereof on abutting owners is general in its terms and gives a discretion to the City Council as to the assessment against abutting owners when a petition of two-thirds of the owners in value shall have been made therefor. This discretion, however, can be exercised only when two-thirds of the owners in value of the property abutting on or affected by the proposed improvement have petitioned therefor. This necessitates, therefore, a finding by the City Council

that the proper number of owners have petitioned for the improvement before an assessment can be made against the property of persons not binding themselves to pay their proportionate share [132] of the expense of the proposed improvement.

Had the City Council by ordinance based upon the petition provided for the improvement and specified therein that two-thirds of the cost would be assessed against the abutting owners, there would arise a strong presumption that the necessary number of petitioners had prayed therefor. Here nothing was intimated by the Council to the public or abutting owners not parties to the petition that their property would be assessed, and as far as their knowledge appears the City Council may have proposed to construct the street at public expense.

It being shown clearly that two-thirds of the property owners abutting on the proposed Harris Street Extension had not petitioned therefor, this is jurisdictional and, as to the nonconsenting owners, the whole proceedings are illegal.

The further question as to necessity of an ordinance, while not necessary to decision of objectives in the case, is, in my opinion, well taken.

The counsel for the City argue that under the subdivision 14 of Section 627 of the Compiled Laws above quoted, it is not necessary for the City Council to proceed by ordinance or resolution to construct or improve a street and assess the abutting owners for two-thirds of the cost thereof. I cannot agree with this position. Undoubtedly, many cases of repair or improvement may arise when it is not

necessary for the Council to adopt an ordinance or resolution providing therefor. These cases are where the rights of third parties or the public are not involved or cases where the work is not chargeable against property, or where property rights are not involved. In many cases, minor repairs may be necessary, or minor improvements made where an ordinance or resolution authorizing such repairs and improvements is not necessary. In such cases the repairs or improvements may be made without formal declaration by the Council. They may be provided for under the general [133] authorization conferring the power to act on the municipal executive officers. This method of procedure is provided for by the statute when it uses the word "otherwise"; but where an improvement is made of the character such as the opening of a street and assessing property owners for the cost thereof, there must be a formal resolution or ordinance—preferably the latter—as provided by section 628 of the Compiled Laws. This section provides that the Common Council may exercise their power by ordinance or resolution. The word "may" as used in the section while permissive in form, should be construed as mandatory where the rights of third parties or the public are involved.

In the case of *Supervisors vs. United States* (4 Wallace, 446), the Supreme Court says:

"The conclusion to be deduced from the authorities is that where power is given to public officers, whenever the public interest or private rights call for its exercise, the language used,

though permissive in form, is, in fact, peremptory.”

In *Atchison Board of Education vs. DeKay* (148 U. S. 591-98) the Court states that:

“* * * the general rule is that where the charter commits the decision of a matter to the council and is silent as to the mode, the decision may be evidenced by a resolution and not necessarily by an ordinance.”

When power to make improvements is conferred in general terms, the municipality may exercise the same only by formal legislative action on the part of the city council. (28 Cyc. 992.)

The fourth subdivision of section 627 authorizes the city in general terms to provide for the construction of streets and improvements on assessment of two-thirds of the cost thereof when petitioned for by a certain ownership of the property affected thereby and abutting thereon. Therefore legislative action must be taken by the City Council to determine the necessity of the improvement and a finding made by the City Council that the necessary number of property owners have petitioned therefor. This can only be done by ordinance [134] or resolution.

17 Amer. & Eng. Ency. of Law, p. 236, note 2.

Eckert vs. Town of Walnut, 91 N. W. 929.

There is no showing that an ordinance or resolution was passed by the City Council, either by the minutes of the Council or by the oral testimony submitted at the hearing.

A discretion is given the City Council to determine whether the cost of a public improvement shall be borne wholly by the city at large or two-thirds thereof by the abutting property. At the time the improvement is decided upon by the Council, it should also determine how the cost thereof should be borne. If this is not done, the whole proceeding would be left to the decision of a city council after the work is finished without the opportunity to the property owners to protest or object.

As is said in *Eckert vs. Town of Walnut*, *supra*:

“If no ordinance or resolution were required in such cases (altering and establishing grades of streets), the owner of such property would be practically at the mercy of the ever-changing personnel of the city or town government, and his property rights and values might be shifted at their own sweet will because of his inability to show their unrecorded vagaries.”

The case at bar shows the necessity of an ordinance. No notice of the manner of the proposed improvement was given the objecting property owners; no opportunity to protest or object before the improvement was contracted for; an assessment was levied by a subsequent council without prior notice or any equalization or opportunity for the owners of the property to be heard. The proceedings were irregular and cannot be sustained.

It further appears that the assessment as to lots 1, 2 and 3 of block 3, Townsite Addition, is against the possessory [135] right of F. J. Furnivall and J. M. Peterson. The former disclaims any

possessory right to lots 1 and 3 and testimony shows the title, if in anyone is in Mary M. Furnivall.

Statute 627, Compiled Laws, provides that the assessment shall be a lien on the property abutting on the improvement. The lien provided for in the statute is not against the owner or his right of possession of the property, which is personal, but against the property itself. The legal title to this property lies in the United States and cannot be assessed.

For the reasons stated the objections of Mary M. Furnivall and J. M. Peterson will be sustained and the order of sale of lot 3, block E, Schoenbar Addition, and lots 1, 2 and 3, Townsite Addition, will be denied.

The Bawden Street Sewer
(Omitted herein).

Let findings and order issue in accordance herewith.

THOS. M. REED,
District Judge.

July 27, 1922. [136]

In the District Court for the Territory of Alaska,
Division No. One at Ketchikan.

No. 537—K. A.

In re Delinquent Tax Roll MARY M. FURNI-
VALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corpora-
tion.

Assignment of Errors.

Comes now the City of Ketchikan, Alaska, and at the time of filing its Petition for Allowance of Appeal herein files and presents this, its Assignment of Errors upon which it will rely in the United States Circuit Court of Appeals for the 9th Circuit from the final judgment and decree of this Court made and entered in the above-entitled cause on the 5th day of October, 1922.

I.

The Court erred in denying the motion for a non-suit made by said The City of Ketchikan at the conclusion of the evidence for and in behalf of the objectors herein.

II.

The Court erred in holding at the conclusion of the evidence herein, that evidence had been introduced herein sufficient in law to sustain the objections made by the above-named objector, or any of said objections.

III.

The Court erred in holding that evidence had been introduced herein sufficient in law to justify it in refusing to make and enter its order for the sale of the property mentioned in the objections filed herein for nonpayment of street grade assessments, in accordance with the application of the City of Ketchikan herein made. [150]

IV.

The Court erred in refusing to make and enter its order for the sale of the property mentioned in the objections filed herein, for nonpayment of the street improvement assessments in accordance with the application of the City of Ketchikan herein.

V.

The Court erred in holding that the delinquent tax assessment herein claimed by the City of Ketchikan was void and of no effect. The Court erred in sustaining by its decree herein the objections, and erred in sustaining any of the objections of said Mary M. Furnivall to the assessment of the costs of the improvement of the Harris Street extension against Lots 1 and 3 in Block 3; and

The Court erred in its decree herein denying the order of sale of said lots as requested by said City of Ketchikan.

The Court erred in its decree herein in holding that said objector should recover his costs and disbursements against said City of Ketchikan.

VI.

The Court erred in its decree herein in holding that the objections made or filed herein stated any

valid or sufficient reason why the City of Ketchikan should not have an order of sale of said lots for non-payment of street improvement assessments, as requested by it herein.

VII.

The Court erred in its decree herein in holding that the objection filed herein stated any valid or sufficient grounds why the objector was entitled to the relief asked for by him or to any part thereof, or to the relief granted in the judgment and decree of this Court, or to any part of said relief. [151]

VIII.

(a) The Court erred in holding (as it held in Finding No. IV), "That prior to the completion of the improvement of the Harris Street extension, no action was taken by the City Council of the City of Ketchikan, Alaska, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon."

(b) The Court erred in holding (as it held in Finding No. IV), that "No finding that the owners of two thirds in value of the property whose property abuts the improvement of said Harris Street extension had petitioned the City Council of the City of Ketchikan therefor, was ever made by said City Council."

(c) The Court erred in holding (as it held in Finding No. IV), that "No ordinance of resolution to construct or improve said street and assess the abutting owners for two-thirds of the cost thereof, or any portion of such cost, was ever made by said

Council in connection with the improvement of said Harris Street extension.

IX.

The Court erred in holding (as it held in Conclusion of Law No. 2), "That said action of Council is irregular and illegal and without authority of law, and null and void."

X.

The Court erred in holding (as it held in Conclusion of Law No. 3), "That the order of sale should be denied and that the objector is entitled to her costs."

XI.

The Court erred in its decree denying the order of sale and giving judgment for costs, and in every part of said decree.

WILL H. WINSTON,

Attorney for City of Ketchikan.

Filed in the District Court, Territory of Alaska, First Division, Jun. 12, 1923. John H. Dunn, Clerk. By _____, Deputy, [152]

In the District Court for the Territory of Alaska,
Division No. One at Ketchikan.

No. 537—K. A.

In Re Delinquent Tax Roll MARY M. FURNI-
VALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corpora-
tion.

**Petition for Allowance of Appeal, and Order
Allowing Appeal.**

The City of Ketchikan, considering itself aggrieved by that certain decree and judgment of the above-entitled court made and entered herein on the fifth day of October, 1922, wherein and where by it was ordered, adjudged and decreed that objections of said Mary M. Furnivall to the assessment against her and against Lots 11, Block E. S. Addn., and Lots 1 and 3 S. Addn., of the costs of the improvement of Harris Street extension be sustained, and wherein the petition of said City of Ketchikan for an order for the sale of said property was denied, and costs and disbursements were adjudged against City of Ketchikan, *does hereby appeal* from said judgment and decree, and from the whole thereof, to the United States Circuit Court of Appeals of the 9th Circuit, for the reasons specified in the Assignment of Errors filed herein and herewith; and said City of Ketchikan prays that this appeal may be allowed, and that a transcript of the record, papers and all proceedings upon which said judgment and decree was made, duly authenticated, may be forwarded to said Circuit Court of Appeals for the 9th Circuit as by law provided; and it further prays that this Court will fix the amount of cost bond on appeal.

WILL H. WINSTON,
Attorney for Appellant.

Filed in the District Court, Territory of Alaska, First Division, Jun. 12, 1923. John H. Dunn, Clerk. By _____, Deputy. [153]

The foregoing petition for allowance of appeal is hereby granted, and the amount of Cost Bond on Appeal is hereby fixed at \$250.00

Done in open court. Dated at Ketchikan this 12th day of June, 1923.

THOS. M. REED,
Judge.

Filed in the District Court, Territory of Alaska, First Division, Jun. 12, 1923. By John H. Dunn, Clerk, By _____, Deputy. [154]

In the District Court for the Territory of Alaska,
Division No. One at Ketchikan.

No. 537—K. A.

In re Delinquent Tax Roll, MARY M. FURNIVALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, City of Ketchikan, Alaska, a municipal corporation, as principal, and Thomas Torry, as surety, are held and firmly bound unto Mary M. Furnivall, above-named objector, her heirs and as-

signs, in the sum of Two Hundred and Fifty Dollars, for which payment well and truly to be made we and each of us bind ourselves, our and each of our successors, heirs and assigns firmly by these presents:

Signed and sealed this 12th day of June, 1923.

The condition of the foregoing obligation is such that whereas in the above-entitled court and cause said Mary M. Furnivall did on the 5th day of October, 1922, recover a decree against said City of Ketchikan sustaining objections made by her to the issuance of an order for the sale for delinquent street assessments on certain property in the City of Ketchikan, and a judgment for costs; and Whereas said City of Ketchikan has appealed from said decree and judgment;

NOW, THEREFORE, if said City of Ketchikan shall prosecute its said appeal to effect and shall pay all costs that may be adjudged against it if it fail to make good its plea and appeal, then this obligation shall be null and void; otherwise it shall [155] remain in full force and effect.

CITY OF KETCHIKAN,

By THOMAS TORRY,

Mayor, Principal.

By THOMAS TORRY,

Surety.

Territory of Alaska,

City of Ketchikan,—ss.

Thomas Torry, whose name is subscribed to the foregoing undertaking as surety, being first duly sworn on oath deposes and says: That he is a resi-

dent of the Territory of Alaska and over the age of 21 years; that he is not an attorney or counsellor, clerk, marshal or other officer of any court; that he is worth the sum of \$500.00 over and above all his just debts and liabilities, and exclusive of property exempt from execution.

THOMAS TORRY,

Subscribed and sworn to before me this 12th day of June, 1923.

(Seal)

WILL H. WINSTON,

Notary Public for Alaska.

My Commission expires June 16, 1925.

Approved as to form and sufficiency this 12th day of June, 1923.

THOS. M. REED,

Judge.

Filed in the District Court, Territory of Alaska, First Division, Jun. 12, 1923. John H. Dunn, Clerk. By _____, Deputy. [156]

In the District Court for the Territory of Alaska,
Division No. One at Ketchikan.

No. 537—K. A.

In Re Delinquent Tax Roll MARY A. FURNI-
VALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation.

Citation on Appeal.

United States of America,

Territory of Alaska,—ss.

The President of the United States of America to
above-named Mary M. Furnivall, objector:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal from the final decree and judgment made and entered by the above-entitled court in the above-entitled cause; to show cause, if any there be, why the said decree and judgment sustaining the objections of said Mary M. Furnivall to the petition of said City of Ketchikan for an order of sale for non-payment of delinquent street assessments of lots 11, Block E, and lots 1, 3, S. Addn., and denying said petition of said City for the sale of said lots, and adjudging costs against said City, should not be set aside, corrected and reversed, and why speedy justice should not be done in the premises.

Witness Honorable William Howard Taft, Chief Justice of The Supreme Court of the United States this 12th day of June, 1923.

THOS. M. REED,

District Judge.

OFFICE OF U. S. MARSHAL,

Juneau, Alaska.

Received July 5, 1923. Docket No. 5240. For service by Deputy Pryde.

Due service of a copy of the within and foregoing Citation on Appeal admitted this — day of —, 1923.

_____,
Attorney for Mary M. Furnivall, Objector.

Filed in the District Court, Territory of Alaska, First Division. June 12, 1923. John H. Dunn, Clerk. By —, Deputy.

United States of America,
District of Alaska,
Division No. One,—ss.

I hereby certify that I received the within Citation on the 5th day of July, 1923, at Juneau, Alaska, and that I served the same on the 5th day of July, 1923, at Juneau, on Judge James Wickersham as Attorney for Mary M. Furnivall, Objector, by showing the original and handing to the said Judge James Wickersham a certified copy of the within Citation, certified to by Geo. D. Beaumont, U. S. Marshal.

Dated at Juneau, Alaska, this 5th day of July, 1923.

Personally and in person,

GEO. D. BEAUMONT,

U. S. Marshal.

By HARRY V. PRYDE,

Office Deputy,

Marshal's fee \$3.00 [158]

In the District Court for the Territory of Alaska,
Division No. One at etchikan.

No. 537—K. A.

In Re Delinquent Tax Roll MARY A. FURNI-
VALL,

Objector,

vs.

CITY OF KETCHIKAN, a Municipal Corporation.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled court:

You will please prepare and have in the U. S. Circuit Court of Appeals at San Francisco within the time required by the rules and orders of court, the record on appeal in the above-entitled matter. Let said record consist of the following enumerated papers and documents, viz.:

Copy of Objection of Mary M. Furnivall, objector, filed herein May 20, 1922, with the exhibits thereto attached;

Copy of Demurrer filed June 3, 1922;

Copy of Motion to strike filed by Mary M. Furnivall;

Copy of Judgment and Decree in favor of Mary M. Furnivall;

Copy of Motion to strike filed by Mary M. Furnivall Nov. 27, 1922;

Copy of Order on Motion to strike, filed Dec. 5, 1922;

Copy of Order re Bill of Exceptions filed Dec. 5, 1922;

Copy of Bill of Exceptions;

Copy of Memorandum Opinion—omitting that part of said opinion following the heading therein, “Bawden Street Sewer”;

Copy of Assignment of Errors;

Copy of Petition for Appeal, with allowance of Appeal;

Copy of Bond and approval;

Copy of this praecipe.

Original Citation, with acceptance of service thereon.

Dated this 12th day of June, 1923.

WILL H. WINSTON,

Attorney for City of Ketchikan.

Filed in the District Court, Territory of Alaska, First Division. June 12, 1923. John H. Dunn, Clerk. By ————, Deputy. [159]

In the District Court for the District of Alaska,
Division Number One at Juneau.

No. 537—K. A.

In Re Delinquent Tax Roll MARY A. FURNI-
VALL,

Objector,

vs.

THE CITY OF KETCHIKAN, a Municipal Cor-
poration.

Supplemental Praecept.

To the Clerk of the District Court, at Juneau.

Sir:

You will please prepare and forward to the U. S. Circuit Court of Appeals at San Francisco, Calif., in accordance with the rules, the following papers supplemental to those named in the Praecept heretofore filed herein on June 12, 1923, to wit:

1. This supplemental praecipe.
2. Original Order Enlarging Time.
3. Order, dated July 14, 1923, directing transportation original exhibits, i. e., Plaintiff's A and Defendant's 1.
4. Original exhibits: Plaintiff's A and Defendant's 1.

Dated July 14, 1923.

Respectfully,

R. E. ROBERTSON,

Of Counsel for the City of Ketchikan, a municipal corporation.

Filed in the District Court, Territory of Alaska, First Division. July 14, 1923. John H. Dunn, Clerk. By M. B. King, Deputy. [160]

In the District Court for the District of Alaska,
Division Number One at Juneau.

No. 537—K. A.

In Re Delinquent Tax Roll MARY A. FURNI-
VALL,

Objector,

vs.

THE CITY OF KETCHIKAN, a Municipal Cor-
poration.

Order Enlarging Time.

Now on this day this matter coming on for hearing on the petition of the City of Ketchikan, the above-named municipal corporation, for an enlargement of 30 days' time within which to file the appeal record herein and to docket the case with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, Calif., and good cause being shown therefor:

Now, therefore, I, the judge who heretofore signed the citation herein, do enlarge the time, and it is hereby ordered that the time be enlarged, for a period of 30 days from the date hereof in which the said City of Ketchikan, the above-named municipal corporation, shall file the appeal record herein and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, Cal.

Done in open court this 9th day of July, 1923.

THOS. M. REED,

Judge.

Entered Court Journal No. S, Page 202.

Filed in the District Court, Territory of Alaska,
First Division. July 9, 1923. John H. Dunn,
Clerk. By M. B. King, Deputy. [161]

In the District Court for the District of Alaska,
Division Number One at Juneau.

No. 537—K. A.

In Re Delinquent Tax Roll MARY A. FURNI-
VALL,

•Objector,

vs.

THE CITY OF KETCHIKAN, a Municipal Cor-
poration.

Order Re Original Exhibits.

Now on this day, it appearing proper to me, the
presiding Judge of the above-entitled District Court,
that these certain original exhibits, i. e.: Plaintiff's
(Objector's) Exhibit A and Defendant's (The City
of Ketchikan's) Exhibit 1, should be inspected by
the Honorable United States Circuit Court of Ap-
peals for the Ninth Circuit upon the appeal herein:

Now, therefore, it is hereby ordered that the
Clerk of this Court transport to the Clerk of
the United States Circuit Court of Appeals
for the Ninth Circuit of San Francisco, Calif., those
two certain original papers or maps which are
Plaintiff's (Objector's) Exhibit A and Defendant's
(The City of Ketchikan's) Exhibit 1, respectively,

so that the same may be inspected by said Circuit Court of Appeals upon the appeal herein.

Done in open Court this 14th day of July, 1923.

THOS. M. REED,

Judge.

Entered Court Journal No. S, Page 209. [162]

Filed in the District Court, Territory of Alaska, First Division. July 14, 1923. John H. Dunn, Clerk. M. B. King, Deputy.

In the District Court for the District of Alaska,
Division Number One, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, JOHN H. DUNN, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 162 pages of typewritten matter, numbered from 1 to 162, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per the praecipe and supplemental praecipe of Appellant on file herein and made a part hereof, in the cause wherein the CITY OF KETCHIKAN, a Municipal Corporation, is Appellant, and MARY M. FURNIVALL, is Appellee, No. 537—K. A., as the same appears of record and on file in my office, and that said record is by virtue of a petition for Ap-

peal and Citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Seventy-six and 50/100 Dollars (\$76.50) has been paid to me by counsel for Appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 16th day of July, 1923.

JOHN H. DUNN,
Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 4061.

CITY OF KETCHIKAN,

Appellant,

vs.

MARY M. FURNIVALL,

Appellee.

Designation Re Printing Record. Rule 23.

To the Clerk of Above-entitled Court:

You will please NOT have printed the following portions of the record sent you in above-entitled cause as the same are duplications of other portions of said record, to wit:

Copy of objections of Mary M. Furnivall, on pages
28 to 39, inclusive.

Copy of demurrer, filed 6/3/22, on pages 44 to 45.

Copy of answer to objections of Mary M. Furnivall, on pages 42-43-44.

Copy of judgment and decree as to Mary M. Furnivall, on pages 46-47.

Copy of motion to strike filed by Mary M. Furnivall, on pages 48-49.

Copy of order on motion to strike of Mary M. Furnivall, on pages 49-50.

Copy of order re bill of exceptions as to Mary M. Furnivall, on pages 50-51.

Copy of opinion of Judge Reed, on pages 137 to 149, inclusive.

AND please NOT have printed the following portions of said record as the same are not embraced in any praecipe filed with the lower court, to wit:

Objections of J. M. Peterson on pp. 39-40-41-42.

Answer to objections of J. M. Peterson on pp. 42-43.

Judgment and decree as to J. M. Peterson on pp. 45-46.

Order to strike as to J. M. Peterson on pp. 47-48.

ALSO *place* NOT have printed the following portions of the bill of exceptions in said record, as said portions relate alone to J. M. Peterson who is not a party to this appeal, to wit:

Pages 99 to bottom of page 102,

Pages 108 to 110,

Pages 114 to 117.

ALSO in the printing of the printed assessment-rolls please omit all that part between "YEAR 1918" and "DELINQUENT IMPROVEMENT

ASSESSMENTS"—Omitting "YEAR 1918" but NOT omitting "DELINQUENT IMPROVEMENT ASSESSMENTS."

Said portions so directed NOT to be printed are NOT material for consideration of any of the errors assigned.

ROBERT W. JENNINGS,
R. E. ROBERTSON,
Attorneys for Appellant.

Copy received this 6th day of August, 1923.

Attorney for Appellee.

United States of America,
Territory of Alaska,—ss.

R. E. Robertson, being first duly sworn on oath, deposes and says: that he is a citizen of the United States, over the age of 21 years, and a resident of Juneau, Alaska; that on August 7, 1923, he duly served upon Judge James Wickersham and Messrs. Wickersham & Kehoe the within designation re printing record by then and there personally handing and delivering to Mr. Joseph W. Kehoe a true and correct copy thereof in the city of Juneau, Alaska, at the law offices of said Judge James Wickersham and Messrs. Wickersham & Kehoe; that the said Kehoe is a law partner of said James Wickersham and is one of the members of the law firm of Wickersham & Kehoe of which the other member is the said Judge James Wickersham; that affiant served said designation re printing record as aforesaid and so handed and delivered it to said Kehoe instead of handing and delivering

it to said Wickersham because said Wickersham was then and there absent from said city of Juneau, Alaska, and in or in the vicinity of Hyder, Alaska, on a business trip the exact duration of which is unknown to affiant.

R. E. ROBERTSON.

Subscribed and sworn to before me this 8th day of August, 1923.

[Seal]

SIMON HELLENTHAL,

Notary Public for Alaska.

My Commission expires Jan. 12, 1926.

[Endorsed]: No. 4061. In the United States Circuit Court of Appeals for the Ninth Circuit. City of Ketchikan, Appellant, vs. Mary M. Furnivall, Appellee. Designation of Appellant Under Rule 23. Filed Aug. 15, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4061.

CITY OF KETCHIKAN,

Appellant,

vs.

MARY M. FURNIVALL,

Appellee.

Affidavit as to Amount in Controversy.

United States of America,
District of Alaska,—ss.

I, Thomas Torry, being first duly sworn on oath depose and say:

I am the Mayor 6 of the city of Ketchikan, Alaska. I have resided in said city for the past twenty years, and am familiar with real estate values in said city having frequently bought and sold lots and blocks therein and being conversant with sales by others.

I am familiar with and qualified to give an opinion as to the reasonable worth and value of the lots involved in this cause, to wit: Lot 11, Block E. S. Addition and Lots 1 and 3, Block E. S. Addition to the said city of Ketchikan. Said lots are at a reasonable estimate worth more than the sum of Five Hundred Dollars; and the value to the City of Ketchikan of an order of sale of said lots as prayed for herein is more than Five Hundred Dollars.

THOMAS TORRY.

Subscribed and sworn to before me this 3d day of August, 1923.

[Seal]

J. E. JOHNSON,

Notary Public for Alaska.

My commission expires May 29, 1927.

Service accepted this 6th day of August, 1923.

Attorney for Appellee.

(Affidavit of Service.)

United States of America,
Territory of Alaska,—ss.

R. E. Robertson, being first duly sworn on oath, deposes and says: that he is a citizen of the United States, over the age of 21 years, and a resident of Juneau, Alaska; that on August 7, 1923, he duly served upon Judge James Wickersham and Messrs. Wickersham & Kehoe the within affidavit as to amount in controversy by then and there personally handing and delivering to Mr. Joseph W. Kehoe a true and correct copy thereof in the city of Juneau, Alaska, at the law offices of said Judge James Wickersham and Messrs. Wickersham & Kehoe; that the said Kehoe is a law partner of said James Wickersham and is one of the members of the law firm of Wickersham & Kehoe of which the other member is the said Judge James Wickersham; that affiant served said affidavit as to amount in controversy as aforesaid and so handed and delivered it to said Kehoe instead of handing and delivering it to said Wickersham because said Wickersham was then and there absent from said city of Juneau, Alaska, and in or in the vicinity of Hyder, Alaska, on a business trip the exact duration of which is unknown to affiant.

R. E. ROBERTSON,

Subscribed and sworn to before me this 8th day of August, 1923.

[Seal]

SIMON HELLENTHAL,

Notary Public for Alaska.

My commission expires Jan. 12, 1926.

[Endorsed]: No. 4061. In the United States Circuit Court of Appeals for the Ninth Circuit. City of Ketchikan, Appellant, vs. Mary M. Furnivall, Appellee. Affidavit as to Amount in Controversy. Filed Aug. 15, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: No. 4061. United States Circuit Court of Appeals for the Ninth Circuit. City of Ketchikan, a Municipal Corporation, Appellant, vs. Mary M. Furnivall, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

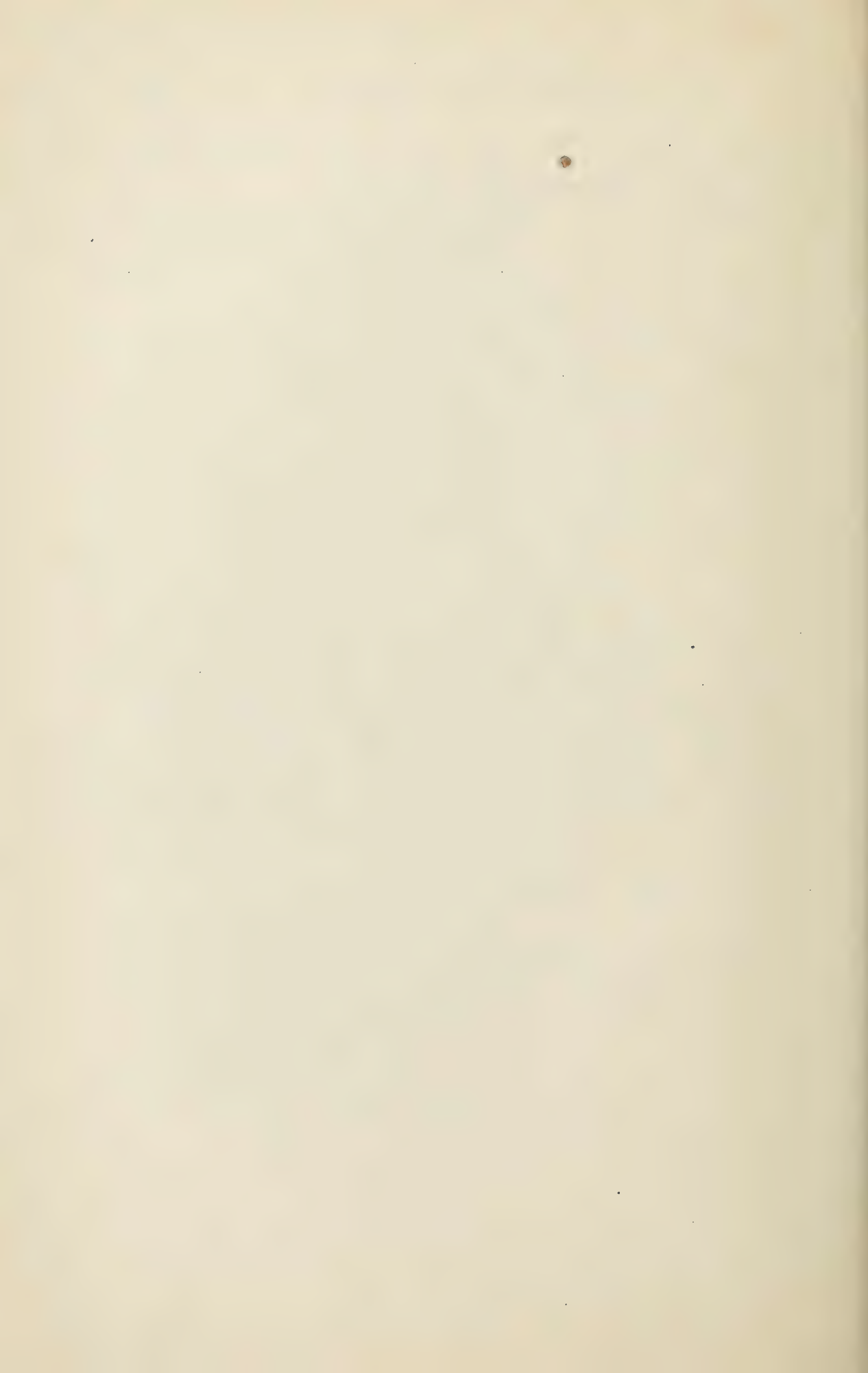
Filed July 26, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



No. 4061

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN RE DELINQUENT TAX ROLL—CITY OF
KETCHIKAN (a municipal corpora-
tion),

Appellant,

VS.

MARY M. FURNIVALL, Objector,

Appellee.

BRIEF FOR APPELLANT

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

WILL H. WINSTON,

A. H. ZIEGLER,

R. E. ROBERTSON,

Juneau, Alaska,

Attorneys for Appellant.

ROBERT W. JENNINGS,

San Francisco, California,

Of Counsel.

FILED

SEP 17 1921

W. H. HENNING

No. 4061

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN RE DELINQUENT TAX ROLL—CITY OF
KETCHIKAN (a municipal corpora-
tion),

Appellant,

VS.

MARY M. FURNIVALL, Objector,

Appellee.

BRIEF FOR APPELLANT

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

Statement.

This is the appeal of the City of Ketchikan, Alaska, from a decree of the District Court of Alaska, Division No. 1, refusing to issue an order for the sale of certain property for failure to pay a street grade assessment, dismissing the proceedings and taxing costs against said city; and arises as follows:

Section 627, Compiled Laws of Alaska (1913) provides that the common councils of Alaska municipalities "shall have and exercise the following powers:

* * * Fourth to provide for the location, construction and maintenance of the necessary streets, al-

leys, crossings, sidewalks, sewers and wharves. *If such street alley, sidewalk or sewer or parts thereof is located and constructed upon the petition of the owners of two thirds in value of the property abutting upon and affected by such improvement, then two thirds of the cost of the same may, in the discretion of the council be collected by the assessment and levy of a tax against the abutting property and such tax shall be a lien upon the same and may be collected as other real estate taxes are collected.* (Italics ours.)

Chapter 69, p. 257 of the Session Laws of Alaska (1913) provides a way for the collection of other real estate taxes, viz:

Section 7. The delinquent tax roll is to be presented in Court for adjustment and order of sale.

Section 8. Thereupon it (the Court) shall "hear, pass upon and determine" the legality of said roll.

Section 9. Any "person owning or having any legal or equitable interest in or a lien upon any tract listed in said duplicate assessment roll, may appear and present at the time of hearing before the Court his objection to, and contest, the validity of the assessment or tax on such property or the granting of the order of sale thereof. *Such objection shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection* and the Court will hear and determine *such objection* and render such decision *thereon* as may be legal and just. At such

hearing *the duplicate tax roll shall be prima facie evidence of the regularity and legality of the assessment and levy of the tax and that the same is unpaid, and no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the subsequent proceedings shall be entertained by the Court which does not affect the substantial rights of the party interposing the objection.* If at such hearing the Court shall find any tract to be overvalued *or overassessed, the same shall be adjusted on equitable principles so that the same shall bear its just proportion to the levy*" etc.

Section 11. "The Clerk of the Town shall immediately correct the original delinquent tax roll to correspond in all respects with the delinquent roll as passed upon and allowed by the Court" etc., etc. (Italics ours.)

On May 20, 1922, The City of Ketchikan duly filed in said Court its delinquent tax roll and asked for an order of foreclosure and sale of divers and sundry lots and blocks, and among these were lots 11, Block E, and Lots 1 and 3, Block 3, S. Addition, which had been assessed to one F. J. Furnivall and were alleged to be delinquent in payment of the local assessment for the Harris Street Extension improvement. (Tr. p. 36.)

In due time Mary M. Furnivall (appellee herein), wife of said F. J. Furnivall, filed in said Court written objections in which she claimed to

be the owner of said lots (except as against the U. S.) and objected to the issuance of any order of sale of said lots. (Tr. pp. 1-22.) Her paper entitled "*Objection*" occupies 22 pages of the printed record, but we think, and so assert, that the objections are set out in paragraphs VIII, IX, XIV, XV, (Tr. pp. 8-9-15)—the remaining portion of said 22 pages being taken up with recitals most of which are irrelevant, and with exhibits, repetitions and generalities. The objections are:

(1) That no petition or request or other authority had ever at any time or place been presented to the said City Council of Ketchikan, aforesaid, signed or endorsed by a majority of the property owners, etc. (Par. VIII, Tr. p. 8.)

(2) That the objector, Mary M. Furnivall, did not sign any such petition but that on the contrary she objected to the improvement. (Par. VIII, Tr. p. 8.)

(3) That the property of the Ketchikan Consolidated Mines Company, an alleged abutter, was not assessed. (Par. IX, Tr. p. 9.)

(4) That objector's said lots are unpatented and the ultimate title is in the United States. (Par. XV, Tr. p. 15.)

(5) That all of said assessments and proceedings of the said City of Ketchikan and its officials are void and in violation of law. (Par. XIV, Tr. p. 15.)

The matter came on to be heard by the Court without a jury; whereupon the City duly presented its delinquent roll as provided by law and asked for judgment of foreclosure and order of sale. The objector then offered some testimony in support of her objections.

At the conclusion of the testimony offered by the objector the City moved, in substance and effect, that the order issue as prayed for because the said objections had not been made out. The motion was denied and the City excepted. The City introduced no further evidence.

The Court took the matter under advisement and later made

Findings.

as follows (Tr. p. 87 et seq.):

“1. That Mary M. Furnivall, at the time of filing in this Court of the delinquent tax roll of the City of Ketchikan for that certain street improvement known as Harris street extension in said Ketchikan, was entitled to the possessory title to lots No. 1 and 3 in block No. 3, Townsite Addition to the City of Ketchikan, Alaska; that said Mary M. Furnivall is the owner of lot 11 in block E, Schoenbar Addition to the City of Ketchikan, Alaska.

2. That at all the times mentioned in the objection filed herein by Mary M. Furnivall, and the said delinquent tax roll of the City of Ketchikan, Alaska, and in the proceedings before its City Council in relation to the extension of the said Harris street, upon which the claim of tax in said delinquent tax roll is made by said City of Ketchikan, Alaska, against said property of this objector, the City

of Ketchikan was an incorporated town or city, within the Territory of Alaska.

3. That on September 7, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan aforesaid, a petition in writing, asking for the construction of an extension of the said Harris street at the expense of the property owners thereon, and the City of Ketchikan; that on October 5, 1920, certain property owners and others, residents of Ketchikan, presented to the City Council of Ketchikan, aforesaid a petition in writing asking for the construction of an extension of the said Harris street at the expense of the property owners thereon, and the City of Ketchikan; and that Mary M. Furnivall, objector herein, was not a party to either of said petitions, or any other document or agreement authorizing or creating a lien, or otherwise permitting the creation of a lien upon her property.

4. That prior to the completion of the improvement of the Harris Street extension, no action was taken by the City Council of the City of Ketchikan, Alaska, as provided by law, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon; no notice was served upon this objector of any proposed improvement of such street; no finding that the owners of two-thirds in value of the property whose property abuts the improvement on said Harris street extension had petitioned the City Council of the City of Ketchikan therefor was ever made by said City Council; no ordinance or resolution to construct or improve said street and assess the abutting owners for two-thirds the cost thereof, or any other portion of such cost, was ever made or passed by said Council

in connection with the improvement of said Harris street extension.

5. That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris street extension as aforesaid, was the adoption at a regular meeting of said council on December 21, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon, and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax had not been paid."

And afterwards the Court entered judgment sustaining the objections made by said objector, denying the prayer for order of sale and adjudging costs against the City. The latter appeals.

Assignments of Error.

(Tr. p. 123)

These are numerous and voluminous —too much so; but they are designed to present, and do, we think, present the following questions, viz:

Was it error to deny the motion of the City of Ketchikan made at the conclusion of the evidence?

Was it error to sustain the objections made?

Was it error to decide the case on objections not made?

Was it error to refuse to issue an order of sale, and to render judgment against the City of Ketchikan?

POINTS, ARGUMENT AND AUTHORITIES.

I.

It was error to deny the motion of the City of Ketchikan made at the conclusion of the evidence on behalf of the objector. This motion, although inartificially expressed, was in substance and effect that the Court overrule the objections and grant the order of sale as prayed for. (Tr. pp. 84-5.)

The only objections the City was called on to meet were the written objections.

We will consider said objections in their numerical order as hereinbefore designated.

Objection No. 1.

“That no petition or request or other authority had ever at any time or place been presented to the City Council of Ketchikan aforesaid signed or endorsed by a majority of the property owners, abutters, etc.”

The statute makes the production of the assessment roll *prima facie* evidence of the regularity of the proceedings. The burden was on the objector to rebut this presumption and not on the City to “bolster up” the roll in the first place.

Town of Ketchikan v. Zimmerman, 4 Alaska 336;

2 page and Jones on Taxation by Assessment, Sec. 1282—Cases in Note 4.

However, it was *alleged* in the “objections” that a petition was presented to the Council *purporting*

to be signed by the requisite number of property owners (Par. IV, Tr. p. 3, Tr. p. 18); and it was *proved* (by the objector) that said petition was approved, bids called for and received and the work ordered to be done, and that said work was done, and paid for by the City and an assessment made. (Tr. pp. 62-3-4.)

The objector produced *no* evidence tending to show that the petition was *not* adequately signed.

Therefore objection No. 1 was not sustained by any evidence.

Objection No. 2.

“That the objector Mary M. Furnivall did not sign any such petition but on the contrary she objected to the improvement.”

There was evidence to that effect, but the fact itself is absolutely immaterial; for the objection is not a valid one. It was not required that the petition be unanimous.

Therefore this objection avails naught.

Objection No. 3.

That the property of the Mines Company was not assessed.

If the Mines Company's property was not benefited it could not be assessed.

Norwood v. Baker, 172 U. S. 269; 43 L. Ed. 443;

5 McQuillan Mun. Corp., Sec. 2043, p. 4377 et seq., also Sec. 2018, p. 4329 et seq.

It is presumed *prima facie* that if any property was omitted it was properly omitted.

2 Page and Jones Taxation by Assessment,
Secs. 1282, 1298.

Here again, under the statute, the burden was on the objector to show that the Mines Company's land was *improperly omitted*—i. e., that it was benefited.

1 Page and Jones Taxation by Assessment,
Sec. 643, p. 1099.

This burden she totally failed to sustain—she introduced no evidence whatsoever on that score. On the contrary whatever evidence there was on the subject tended to show that the Mines Company's land was property omitted. (Tr. p. 81 bottom, p. 82 bottom).

Not only did the objector not introduce any evidence of benefit to the Mines Company's land, she did not even allege such benefit.

Therefore this objection "goes by the board".

Objection No. 4.

That the ultimate title to objector's said lots is in the United States.

This certainly is no valid objection to general taxation or taxation by local assessment, if objector was in possession,—had a possessory title.

Mackey v. Choctaw, 261 Fed. 342;

5 McQuillan on Mun. Corp., Sec. 2043, p. 4382.

Objector alleges that she is the owner of the possessory rights in the lots (Tr. p. 1, Par. 1) and she proved that she had the possession and possessory title of said lots. (Tr. pp. 40-42-45.)

Sec. 16, Ch. 69, Session Laws Alaska 1913,
p. 269.

Objection No. 5.

“That all of said assessments and proceedings of said City of Ketchikan and its officials are void and in violation of law.”

This is simply a general statement—a conclusion of law; no facts are alleged—it raises no issue at all and cannot be considered.

2 Page and Jones, Sec. 917;

Northern Indiana Land Company v. Tyler,
84 N. E. 828 (Ind.)

Therefore this objection follows its brethren.

Thus all the objections which the City was called on to meet are disposed of and it is difficult to see any ground for denying the motion.

As the evidence was being introduced it could not be said that the evidence would have no tendency to support some one or more of the written objections; but when it eventuated (as it did eventuate when the evidence was closed) that not a single valid objection had been sustained by the evidence, the motion was made. The objector did not ask to amend. She was content to rest on her written objections; all other objections are thereby waived.

II.

**THE FINDINGS DO NOT SUSTAIN ANY MATERIAL
OBJECTION MADE.**

The only objection *made and sustained* was the objection that “Mary M. Furnivall, objector herein was not a party to either of said petitions or any other document or agreement authorizing or creating a lien or otherwise permitting the creation of a lien upon her property”.

As before said, while this is true, yet it is unimportant—absolutely immaterial.

As no material objection made was sustained the decree should have been for the City of Ketchikan.

III.

**ALL OTHER FINDINGS WHICH ARE ADVERSE TO
THE CITY ARE (1) OUTSIDE THE ISSUES, AND
(2) ARE EITHER NOT BASED ON THE EVIDENCE OR LACK OF EVIDENCE, (3) OR
ARE IMMATERIAL.**

To amplify.

Finding No. 4.

(Tr. p. 89):

(a) “That prior to the completion of the improvement of the Harris Street extension no action was taken by the City Council of the City of Ketchikan, Alaska, as provided by law, authorizing the improvement of such street or assessing the cost of such improvement against the property owners thereon or against the property abutting thereon.”

(1) No such objection as this was made.

The only issues in the case are those made by the written objections.

This is a special statutory proceeding—not in the course of the common law. The Court has jurisdiction to consider those objections only which were made by the “written objections” on file. The statute provides that “such objections shall be in writing and specify the grounds of objection” and the Court will hear and determine “such objections” and render such judgment *thereon* as may be legal and just. No amendment was asked for or made—indeed the statute does not provide for amendments.

The scope of the inquiry is determined by the terms of the statute.

28 Cyc. p. 1180 (VII).

The findings must be within the issues.

City of Spokane v. Curtis, 120 pp. 70-2, Co. p. 72 (4).

Objections not presented as required are waived.

2 Page and Jones on Taxation by Assessment, Sec. 918/01558—Note 11.

XXV Am. & Eng. Encyc. p. 1225—and cases cited;

28 Cyc. p. 1174, Note d.

(2) There is no evidence that “no action, etc., was taken.” The presumption is that the necessary action was taken. The evidence shows that a peti-

tion purporting to contain the requisite number of signatures was filed and approved, bids called for and received, and the work ordered done and the assessment made. (Tr. p. 63-64).

As to there not having been, *prior to completion* of the improvement, any action “assessing the cost of such improvement against the property owners thereon or against the property abutting thereon,” it is sufficient to say that the statute does not require such action to be taken or forecasted *prior* to the improvement.

(b) “No notice was served upon this objector of any proposed improvement of such street”.

(1) No such objection was made by the objector.

(2) It is immaterial whether or not any such notice was served. The statute does not require such notice to be given or served.

Parsons v. City of Grand Rapids, 104 N. W. 730-733, 2nd. Col. (Mich.)

D. C. v. Burgdorf, 6 D. C. Appeals 465.

Before the assessment became effectual—i. e., before the property could be sold—the owner of the property had notice, had her day in court. This is sufficient notice.

Davidson v. The Board, 96 U. S. 97; 24 L. Ed. 616;

Walston v. Nevin, 128 U. S. 578, 32 L. Ed 544;

Caldwell v. Village of Carthage, 31 N. E. 602 (Ohio).

The object of notice is to enable the proper owner to protect his rights. If he appear in the case the object of notice has been accomplished and he will not be heard to complain on that ground.

Barker v. Omaha, 16 Nebr. 269-271, 20 N. W. 382. Citing many cases.

(c) “*No finding that the owners of two thirds in value of the property whose property abuts the improvement on said Harris Street extension had petitioned the City Council of the City of Ketchikan therefor was ever made by said City Council* (Idem).

(1) No such objection is among the objections made by the objector.

(2) No such finding is required to be made *by the City Council*.

(3) The uncontradicted evidence shows that the petition was *approved*. (Tr. p. 63). This is a finding that the petition was sufficient.

(d) “No ordinance or resolution to construct or improve said street and assess the abutting owners for two thirds the cost thereof, or any other portion of such cost, was ever made or passed by said Council in connection with the improvement of said Harris Street extension”.

(1) No such objection is among those made by the objector.

(2) No *Ordinance* is necessary, for it is provided in Section 628, C. L. A. (1913) that the Coun-

cil may exercise their powers by Ordinance *or* Resolution.

When the petition was presented the Council approved it and ordered it placed on file and directed that bids be called for (Tr. p. 63); bids were received, the contract let, the work done and paid for (Tr. p. 64) and the Council made the assessment by a *resolution* (Tr. p. 66).

Finding No. 5.

(Tr. p. 89).

“That the only action of record taken by the City Council of the City of Ketchikan in the matter of the improvement of Harris Street extension as aforesaid was the adoption at a regular meeting of said Council on December 19, 1921, of an assessment against the property abutting on said improvement for the cost of the improvement thereon and the later publication of an application to this Court for an order of sale of the property so assessed on which the tax had not been paid”.

(1) No such objection is among those made by the objector.

(2) The uncontradicted evidence is that the things mentioned in this finding are not the “only action” of record taken by the City Council in the matter of the improvement of Harris Street Extension”. On the contrary Mr. Winston (objector’s witness) read from the minutes, (Tr. p. 63) as follows:

“The amended petition on Harris Street was read and on motion by Councilman Paup, seconded by Councilman Morrison, the same was approved and ordered placed on file.

The motion carried. A motion was regularly made and carried that bids be called for on the work on Harris Street to be in by the next regular meeting, by the City Clerk”.

Bids were called for; about half a dozen bids were received and the contract was let and the improvement was constructed under the contract at a cost of \$4,958.80, all of which was paid by the City. (Tr. p. 63). On being asked if he had read all the minutes in regard to ordering the work, Winston replied:

“No, I don’t think I have. I think it would take more than an hour to read all the minutes with respect to the orders given on that work.” (Tr. p. 64).

Whereupon counsel rested on his laurels; but this is very far from being sufficient to sustain a finding that the records are as meagre as the Finding would have them. One would judge from the Finding that there was no record that a petition had been received and approved, or that the work was ordered done, or that the work was done or paid for; whereas the uncontradicted testimony shows that all said things were done.

To Recapitulate:

(I) The objections *made* were insufficient in law.

(II) There was no evidence to sustain any *material objection made*.

(III) The findings sustain *no material objection made*.

(IV) The material findings *made* (Findings Nos. 4 & 5) are outside the issues.

(V) The material findings made (Findings Nos. 4 & 5) are not supported by the evidence.

The decree then has no valid support and must fall.

Dated, September 15, 1923.

Respectfully submitted,

WILL H. WINSTON,

A. H. ZIEGLER,

R. E. ROBERTSON,

Attorneys for Appellant.

ROBERT W. JENNINGS,

Of Counsel.

No. 4061

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY OF KETCHIKAN (a municipal corporation),

Appellant,

VS.

MARY M. FURNIVALL,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

A. H. ZIEGLER,

Alaska,

ROBERT W. JENNINGS,

Mills Building, San Francisco,

*Attorneys for Appellant
and Petitioner.*

No. 4061

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CITY OF KETCHIKAN (a municipal corporation),

Appellant,

vs.

MARY M. FURNIVALL,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions this court for a rehearing, and begs leave to submit the following:

I.

LACK OF ORDINANCE. WAIVER OF OBJECTION.

The affirmance by this court of the decree of the court below was stated to be on the ground that the record showed that there had been no ordinance or resolution authorizing the improvement and special assessment.

Conceding that the lack of an ordinance or resolution would have been sufficient reason for the lower

court to quash the assessment, if such lack of ordinance had been one of the written objections filed; yet, there being no such objection filed, we maintain that the lack of an ordinance could not be considered—it was outside the issues—it was waived. We raised this point in the original brief (p. 13 and p. 15 (d)).

The power of the City to make special assessments on abutting owners to pay the cost of improvements is conferred by Section 627 C. L. A. 1913, and “hangs on an If”, but that “If” was the only condition imposed—it is the only jurisdictional requirement. There was no showing that that requirement did not obtain. Under the statute it is presumed to have obtained, there being no evidence to the contrary (4 Alaska 366). The lower court made no finding on the subject.

The passage of an ordinance or resolution is a means by which the power conferred may be put into effect, but it does not affect the existence of the power. It is not “constitutional” or jurisdictional in the sense that it could not be waived, and the legislature has plenary power to say how, in what manner and to what extent the property owner may be heard in opposition to a special assessment which a City is given the power to make, and which does not trench upon constitutional rights. This assessment did not trench upon any constitutional rights. The objector had his “day in court” before the assessment could be made effectual—full opportunity to urge the objection of no ordinance—but he failed to avail himself of that opportunity.

“It is within the power of the legislature to declare what steps shall be taken, and, having this power, it necessarily follows that it may provide that parties, by failing to object, shall be held to have waived objections. If there is power to prescribe the acts that shall be done, there is also power to declare when the performance of such acts shall be dispensed with or when the party shall be held estopped to aver that they have not been performed * * * if the legislature may authorize the letting of contracts without advertising for proposals it may declare that an objection that there was no notice shall be unavailing, unless made before a designated time and in a specified manner. * * * It does no more in declaring an estoppel or waiver than it might have done in the first instance.” 2 Elliott on Roads and Streets, Sec. 738, 3rd Ed.

In *Bass v. City of Casper*, 205 p. 1008, it is said on p. 1013, middle 2nd column:

“Whatever the legislature could have dispensed with in the first place it has power, as we have seen, to declare waived, or the defects therein cured, unless objections are filed as provided by law, citing cases.”

And at a former hearing of same case, speaking of a waiver statute, the court said:

“That section is in fact so broad and sweeping in its provisions, that *it is clear that defects in all jurisdictional steps which depend on the statute merely, and involve no constitutional rights are, in the absence of objections, filed as provided by law, when and after opportunity for the filing of such objections has been given and has existed, declared irregularities merely, and must be so held at least where there has*

been an attempt in good faith to follow the provisions of the law. * * * The only question therefore remaining is whether or not some constitutional guaranties have been violated.” (Idem. 205, p. 443, 2nd col. bottom.)

In that case there was an express provision that objections not made were to be considered as waived. There is no specific provision to that effect in the Alaska Statute, but it necessarily implied, as we shall show.

In the well considered case of *City of Birmingham v. Wills*, 59 So. 173-177, bottom, it was said:

“The preliminary notice, and all those other steps preliminary to the notice of the assessment and the assessment itself, about the absence or perversion of which the bill complains, are provisions of legislative grace. Being written in the statute, they must be observed or the property owner may at the final hearing have the benefit of the omission of *such* of them as may be considered essential *where there has been no waiver. But their omission may be waived.* * * * *Jurisdiction of the subject matter is conferred by the statute. Jurisdiction of the property and its owner in each case is prepared by the passage of preliminary resolutions or ordinances, and by all those essential steps required to be taken prior to the time when the proceeding takes on a judicial aspect. But in taking these steps the council exercises a business or administrative power. The effect of the statute is to make material defects or omissions in them just cause for an abatement of the proceeding, but its intention is to destroy all distinctions between defects or omissions and mere errors and irregularities in the preparatory steps in those cases in which the*

owners, after due notice and an opportunity to present every defense, remains silent and inactive."

"Since the legislature might have dispensed with any estimate, the failure of the council to make any would doubtless be held an irregularity which might be waived by a failure to protest." *Collins v. Ellensburg*, 68 Wash. 212, 122 p. 1010.

Alaska Statute:

The Alaska Statute provides that

"Such objections shall be in writing and specify the grounds of objection to the assessment or tax on the particular tract represented in such objection, and the court will hear and determine such objection and render such decision thereon as may be legal and just, etc." Ch. 69 p. 257, Session Laws, Alaska, 1913).

This is in effect a declaration that objections not so made are waived, provided, of course, that the City had jurisdiction over the subject matter, i. e., over the levying of special assessments.

On this point it is said in Section 920 of 2 Page and Jones on Taxation by Assessment:

"The issues which may be heard and determined at confirmation are controlled by statute. As long as the constitutional rights of the property owners are not violated, it rests with the legislature to say to what extent they may be heard in opposition to the assessment. Accordingly, the rights of the property owner are limited to the issues provided for by statute, and a hearing cannot be had upon issues not so provided for."

The same author says, in Section 917, p. 1556:

“The objections must, however, show the point upon which the action of the court is invoked, and must so state it as to enable the adversary party to obviate the objection, if possible.”

And in Section 918, p. 1558, he says:

“Under statutes which provide for filing objections and for a hearing upon the questions thus raised, the intention of the legislature is to provide a prompt and speedy method of determining the *validity* of the assessment and the proceedings leading up thereto; under many of the statutes an opportunity is thus presented to determine the validity of the proceedings before any expense has been incurred for the public improvements for which it sought to levy the assessment. Under such statutes, accordingly, a failure to file objections operates as a waiver of all which can in law be waived, and if such objections are not interposed at the proper time they cannot be interposed subsequently.

“* * * If the property owners make default and fail to file objections confirmation is said to follow as a matter of course. * * * On the same principle, filing objections in which certain defects are pointed out operates as a waiver to *all* other defects to which such objections could have been interposed. * * * Objections which do not raise questions of jurisdiction are waived by filing objections in which such defects are not specified. * * * Thus, where the trial court before which a large number of objections had been filed required the property owner to point out specifically on what objections he relied, and he did so, other objections will be regarded as waived.”

“The evidence offered at confirmation must tend to substantiate the respective claims, and if offered by the property owners must tend to

show the invalidity of the assessment with respect to one or more of the questions which can be considered at the confirmation." *Idem.* Sec. 922.

"But they (objections) must be good and sufficiently specific. The issues to be determined on confirmation are usually limited to those provided for by statute." *Elliott on Roads and Streets.* Sec. 567, p. 117.

Section 628, C. L. A. 1913, provides that

"No ordinance or resolution shall be valid unless adopted by a vote of *four* members of the council at a meeting where not less than *five* members are present."

Surely, an objection that only *three* members voted for the ordinance or that only *four* members were present, would be waived if not embodied in the written objections, and yet the invalidity would be as cogent in the one case as in the other. In both cases there would have been "no ordinance".

In *City of Marengo*, Eichler 91 N. E. 758-9, the court said:

"None of the objections put in issue the fact that the ordinance had been passed, and it was therefore unnecessary to prove it."

In *City of Chicago v. Wells*, 113 N. E. 695, the question was on the proper *publication* of an ordinance. The court said:

"The question of such publication did not go to the jurisdiction of the court as to the subject matter and could, therefore, be waived. * * * Objections *not urged* and proven are considered waived" (p. 696).

The case of *Stewart v. City of Detroit*, 100 N. W. 613 (Mich.), goes so far as to hold that the failure to assign the absence or insufficiency of a *petition* will preclude the objector from urging that as a reason for setting aside the assessment.

As the objection of lack of an ordinance was not one of the objections specified—was not an issue—the City was not called on to meet such objection. The lower court had jurisdiction to pass upon only “*such*” objection, i. e., upon an objection made in writing.

II.

In its opinion this court said, also:

“Furthermore, under the Alaska Statute the discretion to levy a tax upon abutting property to pay two-thirds of the cost of an improvement must be exercised when the petition for the improvement is heard and before, or at the time, the improvement is ordered.”

We submit that the statute is silent on the subject of when the discretion is to be exercised and that no such objection was specified in the written objections.

Dated, San Francisco,
January 9, 1924.

Respectfully submitted,

A. H. ZIEGLER,

ROBERT W. JENNINGS,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.

Dated, San Francisco,
January 9, 1924.

ROBERT W. JENNINGS,
*Attorney for Appellant
and Petitioner.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation,
Now Known as ALLEN MURPHY
COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED
AUG 11 1923
U. S. DISTRICT COURT
DISTRICT OF OREGON

United States
Circuit Court of Appeals
For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEY LUMBER COMPANY, a Corporation,
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Names and Addresses of the Attorneys of Record.

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NASH, GRAHAM & MARSCH, Yeon Building,
Portland, Oregon, for the Defendant in Error.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant in Error.

Citation on Writ of Error.

United States of America,

District of Oregon,—ss.

To O. R. Menefee Lumber Co., a corporation,
known as Allen Murphy Co., a corporation.

GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit at San Francisco,
California within thirty days from the date hereof
pursuant to a writ of error filed in the clerk's of-

fice of the District Court of the United States for the District of Oregon, wherein Owen M. Bruner Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 2d day of June, 1923.

CHAS. E. WOLVERTON,

Judge. [1*]

United States of America,
District of Oregon,—ss.

Service of the within citation on writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,

Of Attys. for Defendant. [2]

[Endorsed]: No. L-8874. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, Plaintiff, vs. O. R. Menefee Lumber Co., Defendant. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Jun. 2, 1923. By G. H. Marsh, Clerk.

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States Circuit Court of Appeals for
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OWEN M. BRUNER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America.
to the Judge of the District Court of the
United States for the District of Oregon,
GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which
is in the said District Court, before you, or some
of you, between Owen M. Bruner Company, a cor-
poration, plaintiff, and plaintiff in error, and O.
R. Menefee Lumber Co., a corporation, now known
as Allen Murphy Co., a corporation, defendant, and
defendant in error, a manifest error has happened to
the great damage of the said Owen M. Bruner Com-
pany, a corporation, plaintiff, and the plaintiff in
error, as by its complaint appears, we being will-
ing that error, if any there has been, should be
duly corrected, and full and speedy justice be done

to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the [3] same at San Francisco, California, within thirty days from this date, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 2d day of June, 1923, and in the one hundred forty-seventh year of the Independence of the United States of America.

[Seal]

G. H. MARSH,

Clerk of the United States District Court, District of Oregon.

By F. L. Buck,
Chief Deputy.

Allowed: CHAS. E. WOLVERTON,
United States District Judge.

Service of the foregoing writ of error made this 2d day of June, 1923, upon the District Court of the United States for the District of Oregon, by

filing with me as Clerk of said Court, a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the United States District Court, District
of Oregon.

By F. L. Buck,
Chief Deputy.
CHAS. E. WOLVERTON,
Judge. [4]

United States of America,
District of Oregon,—ss.

Service of the within writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attys. for Defendant. [5]

[Endorsed]: No. L-8874. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, Plaintiff, vs. O. R. Menefee Lumber Co., Defendant. Writ of Error. Filed June 2d, 1923. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. L. Buck, Chief Deputy.

In the District Court of the United States for the
District of Oregon.

November Term, 1921.

BE IT REMEMBERED that on the 6th day of December, 1921, there was duly filed in the District Court of the United States for the District of Ore-

gon, a complaint, in words and figures as follows,
to wit: [6]

In the District Court of the United States for the
District of Oregon.

(AT LAW.)

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Complaint.

Comes now the above-named plaintiff, and for
cause of action against the above-named defendant,
complains and alleges:

I.

That at all times and dates herein mentioned, the
plaintiff, Owen M. Bruner Company, was and now
is a corporation duly incorporated under and by
virtue of the laws of the State of New Jersey, with
its principal place of business in the city of Phila-
delphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned,
the defendant, O. R. Menefee Lumber Company,
was and now is a corporation duly incorporated
under and by virtue of the laws of the State of
Oregon, with its principal place of business in the

city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company the defendant herein has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing under date of June 4, 1920, Supplementary Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation, duly existing under the laws of the State of Oregon.

[7]

III.

That the grounds upon which the Court's jurisdiction depends in this case are the diversity of citizenship existing between plaintiff and defendant herein, and the amount involved in this cause being above the sum of \$3,000.00.

IV.

That on or about the 21st day of November, 1919, plaintiff and defendant entered into an agreement wherein and whereby the defendant agreed to sell to plaintiff and the plaintiff agreed to buy from the defendant 25 car loads of Douglas Fir Lumber at the agreed and stipulated price of \$48.50 per thousand feet F. O. B. New York or points within the New York territory taking the New York freight rate of 80 cents, or at the agreed and stipulated price of \$48.00 per thousand feet F. O. B. Philadelphia or points within the Philadelphia territory taking the 78 cents freight rate; that thereafter or on or about the 25th day of November, 1919,

said agreement was confirmed by a signed and accepted order which read as follows:

Send all invoices with Bill of Lading to this Office.

Owen M. Bruner Company
Wholesale Lumber

Order No. 11385.

Please enter the above number on your invoice.
Southard's Code Used.

Philadelphia, Pa., November 25, 1919.
To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Pa.

Please Ship from Owen M. Bruner Company to Owen M. Bruner Company at Shipping instructions to be supplied.

Enter in Bill Lading

Rate not to exceed
Route via

#1 COMMON DOUGLAS FIR—ROUGH

25 Cars 2x4 to 12x12 (with some larger sizes)—
12 to 40 ft. long.

Price delivered on a New York or 80

cent rate \$48.50

Price delivered on a 78 cent rate of

freight \$48.00

[8]

To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as we book the business.

This order covers order given you over 'phone on

November 21st., and bears correction as per your letter of the 22nd inst.

Prices F. O. B. cars. As above.

Commission.

Cash Discount 2%

When to ship. As wanted.

Please acknowledge receipt of this order by return mail.

OMB:O

Yours truly,

OWEN M. BRUNER CO.,

W. C. ASHENFELTER,

Agt. for O. R. Menefee Co.

Do not Stencil Your Name or Advertisement on Car.

V.

That relying on the above mentioned agreement, the plaintiff herein at great costs and expenses, advertised and offered for sale to its clients the stock of lumber above mentioned.

VI.

That thereafter and on the 13th and 29th days of December, 1919, the plaintiff herein acting in compliance of the terms of the aforesaid agreement, gave shipping instructions to the defendant for delivery of two carloads of the said Douglas Fir Lumber of approximately 28,000 feet each.

VII.

That the defendant on the 19th day of December, 1919, advised the plaintiff that it had cancelled the order for 25 cars of lumber and that it would not ship said car asked for by plaintiff under date of December 13, 1919, nor any other part of said lumber so ordered under plaintiffs and defendants agreement as alleged in Paragraph IV herein. [9]

VIII.

That thereafter plaintiff made numerous demands upon said defendant that defendant live up to its agreement and ship said cars of lumber but defendant failed, neglected and refused to do so.

IX.

That the average car of Douglas fir rough lumber consists of 25,000 feet and therefore the amount of lumber covered by above agreement totals 625,000 feet.

X.

That at the time defendant refused to continue with the above-mentioned agreement the market price of #1 Common Douglas fir rough lumber was \$64.35 per thousand feet F. O. B. Philadelphia or points within the Philadelphia territory taking the 78 cents freight rate and was \$64.85 per thousand feet F. O. B. New York or points within the New York territory taking the New York freight rate of 80 cents or \$16.35 per thousand more than the price agreed on in the agreement mentioned in paragraph IV herein.

XI.

That by reason of defendant's failure, neglect and refusal to follow out the terms of the above-mentioned agreement plaintiff has been damaged to the extent of \$10,218.75.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$10,218.75 and for its costs and disbursements incurred herein.

SAMUEL B. LAWRENCE,

Attorney for Plaintiff.

State of Pennsylvania,
County of Philadelphia,—ss.

I, Owen M. Bruner, being first sworn, depose and [10] say that I am the president of Owen M. Bruner Company, plaintiff, in the above-entitled action; and that the foregoing complaint is true as I verily believe.

OWEN M. BRUNER,

Subscribed and sworn to before me this first day of December, 1921.

[Notarial Seal] FRANCIS R. MATLOCK,

Notary Public for the State of Pennsylvania.

Commission expires Jany. 22, 1925.

Filed December 6, 1921. G. H. Marsh, Clerk.
[11]

AND AFTERWARDS, to wit, on the 6th day of December, 1921, there was issued out of said court, a summons, which with the return of service thereon is in words and figures, as follows, to wit: [12]

Return on Service of Writ.

United States of America,
District of Oregon,—ss.

I hereby certify and return^{as} that I served the annexed summons and copy of complaint on the therein named O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, by handing to and leaving a true and

correct copy thereof with Percy Allen, President of Allen Murphy Co., a corporation, personally at Portland, Oregon, in said District on the 6th day of December, A. D. 1921.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Lee Morelock,

Deputy. [13]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Summons.

The President of the United States, to O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, the above-named defendant, GREETING:

You are hereby commanded to be and appear in the above-entitled Court, holden at the city of Portland, in said district, and answer the complaint filed against you in the above-entitled action, within ten days from the date of the service of this summons upon you, if served within the

county of Multnomah, in said district, or if served within any other county of said district, then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for \$10,218.75 and its costs and disbursements incurred herein.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

WITNESS the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of said court, and the seal thereof affixed at Portland, in said district, this 6th day of December, 1921.

[Seal]

G. H. MARSH,
Clerk.

By F. L. Buck,
Deputy Clerk.

Returned and Filed Dec. 6, 1921. G. H. Marsh,
Clerk. [14]

AND AFTERWARDS, to wit, on the 29th day of December, 1921, there was duly filed in said court an answer, in words and figures as follows, to wit: [15]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO.,
a Corporation,

Defendant.

Answer.

Comes now the defendant above named and for
answer to plaintiff's complaint, admits, denies and
alleges:

I.

Admits Paragraphs I and II of said complaint.

II.

Denies Paragraphs III, IV, V and VI of said
complaint and the whole thereof.

III.

Answering Paragraph VII of plaintiff's com-
plaint this defendant denies each and every alle-
gation therein contained and the whole thereof, ex-
cept that this defendant says that on December 2,
1919, immediately upon the receipt by it of the
alleged order it notified one W. C. Ashenfelter
that said alleged order could not and would not be
accepted as given, and that the only way it could
handle said order was as an order for random
widths and lengths; that in answer to said letter

of December 2d, said Ashenfelter advised this defendant that the plaintiff could not place said order for random widths and lengths; that thereupon and under date of December 18th this defendant wired said Ashenfelter refusing said order and in the same mail returned said order, and as this defendant is informed and believes, and therefore says, said Ashenfelter communicated all of said letters and wires to this plaintiff. [16]

IV.

Denied Paragraphs VIII, IX, X and XI of said complaint and the whole thereof.

And for a further and separate answer and defense to plaintiff's complaint this defendant alleges:

I.

That at all times and dates herein mentioned the plaintiff, Owen M. Bruner Company, was and now is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, with its principal place of business in the city of Philadelphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned the defendant, O. R. Menefee Lumber Company was, and now is a corporation duly incorporated under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company, the defendant herein, has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing un-

der date of June 4, 1920, Supplementary Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation duly existing under the laws of the State of Oregon.

III.

That at all the times herein mentioned one W. C. Ashenfelter was a resident of Philadelphia, in the State of Pennsylvania, and represented this defendant as a lumber broker and not otherwise; that on or about the 14th day of November, 1919, the [17] defendant received an inquiry from the said Ashenfelter for prices on several cars 2"x4" to 12"x12" and 12' to 40' long No. 1 common Douglas fir rough, to be shipped to the order of the plaintiff herein; that said inquiry was for prices upon lumber to be shipped in any of the sizes or lengths therein specified at the option of the defendant; that thereupon this defendant telegraphed prices on said material as requested; that thereafter and on or about the 2d day of December, 1919, the defendant received from the plaintiff a writing which purported to be an order for 25 cars 2"x4" to 12"x12" (with some larger sizes) 12' to 40' long at the prices this defendant had quoted to said Ashenfelter; that said purported order provided that said material should be shipped in sizes and lengths as wanted by the plaintiff and should be shipped when wanted by this plaintiff; that immediately upon the receipt of said purported order this defendant notified said Ashenfelter that said

order was not in accordance with the inquiry of said Ashenfelter nor with the quotation made by this defendant to said Ashenfelter on said material, but that contrary to said inquiry and said quotation said order provided for the shipment of said material in sizes and lengths as wanted by said plaintiff instead of in random widths and lengths as provided for by said inquiry and said offer, and that this defendant could not accept said order as received by this defendant from the plaintiff but could only handle the same in random widths and lengths as provided by said inquiry and quotation; that thereafter and on or about the 18th day of December, 1919, this defendant received from the plaintiff instructions to ship approximately 28,000 feet No. 1 common Douglas fir rough, to be applied upon said alleged order hereinabove referred to; that said order specified the number of pieces of each size to be shipped and likewise specified the lengths thereof; that none of the material so [18] requested to be shipped pursuant to said order was less than twenty feet in length nor more than thirty-six feet in length; that said request to ship was not in accordance with the inquiry received by this defendant from said Ashenfelter and the quotation made by this defendant to said Ashenfelter as above set forth; that upon the said 18th day of December, 1919, this defendant notified said Ashenfelter that said order would not be accepted by this defendant and on said date this defendant returned said order to said Ashenfelter for the reasons above set forth.

IV.

That this defendant is informed and believes and therefore says that said Ashenfelter communicated all of said correspondence between him and this defendant with reference to said order to the plaintiff who had full notice and knowledge thereof, and this defendant further says on information and belief that said Ashenfelter in said transaction without the knowledge, consent or acquiescence of this defendant was the agent of and represented said plaintiff.

And for a second further and separate answer and defense and by way of counterclaim this defendant alleges:

I.

That at all times and dates herein mentioned the plaintiff, Owen M. Bruner Company, was and now is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, with its principal place of business in the city of Philadelphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned the defendant, O. R. Menefee Lumber Company, was and now is a corporation [19] duly incorporated under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company, the defendant herein, has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing under date of June 4, 1920, Supplementary

Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation duly existing under the laws of the State of Oregon.

III.

That on or about the 31st day of January, 1921, the plaintiff was indebted to the defendant in the sum of \$551.32; that on said date an account was stated between said plaintiff and defendant on which there was found to be due to the defendant from the plaintiff the sum of \$551.32, which sum the plaintiff promised and agreed to pay to this defendant.

IV.

That payment of said sum has been demanded from the plaintiff by this defendant, but no part thereof has been paid; that there is now due from the plaintiff to the defendant on said account stated the sum of \$551.32, with interest thereon at the legal rate from the 31st day of January, 1921, until paid.

WHEREFORE, this defendant having fully answered plaintiff's complaint prays that it may be dismissed with costs, and that it may have and recover judgment against the plaintiff for the sum of \$551.32 with interest thereon at the legal rate from January 31, 1921, until paid, and for its costs and disbursements incurred herein.

NASH, GRAHAM and MARSCH,

Attorneys for Defendant. [20]

State of Oregon,
County of Multnomah,—ss.

I, Percy Allen, being first duly sworn, depose and say that I am the president of Allen Murphy Co., a corporation, defendant in the above-entitled action; and that the foregoing answer is true as I verily believe.

PERCY ALLEN.

Subscribed and sworn to before me this 29th day of December, 1921.

[Notarial Seal]

H. F. FORSBERG,

Notary Public for the State of Oregon.

My commission expires June 30, 1925.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 29th day of December, 1921, by receiving a copy thereof, duly certified to as such by Wm. S. Nash, one of the attorneys for defendant.

SAMUEL B. LAWRENCE,

Attorney for Plaintiff.

Filed December 29, 1921. G. H. Marsh, Clerk.
[21]

AND AFTERWARDS, to wit, on the 5th day of January, 1922, there was duly filed in said court, a reply in words and figures as follows, to wit: [22]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation.
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Reply.

Comes now the plaintiff and for reply to the
answer and defense of the defendant, admits, de-
nies and alleges as follows:

I.

Plaintiff admits paragraph I of defendant's an-
swer.

II.

Denies each and every allegation contained in
defendant's answer except wherein the same ex-
pressly admits the allegations of plaintiff's com-
plaint.

III.

Plaintiff admits paragraphs I and II of the
first separate answer and defense of defendant's
answer but denies each and every allegation con-
tained in defendant's further and separate an-
swer except wherein the same expressly admits
the allegations of the plaintiff's complaint.

IV.

The plaintiff admits paragraphs I and II of the defendant's second and further separate answer and defense and counterclaim but denies paragraphs III and IV thereof.

WHEREFORE, plaintiff demands judgment against the defendant as prayed for in plaintiff's complaint filed herein.

SAMUEL B. LAWRENCE,
Attorney for Plaintiff. [23]

State of Oregon,
County of Multnomah,—ss.

I, Samuel B. Lawrence, being first duly sworn, depose and say that I am the attorney of record for the plaintiff in this cause; that I am acquainted with the facts in this cause, and that the plaintiff is without the State of Oregon, and for these reasons make this reply in the above-entitled action; and that the foregoing reply is true as I verily believe.

SAMUEL B. LAWRENCE.

Subscribed and sworn to before me this 4th day of January, 1922.

[Notarial Seal] M. J. LAIDLAW,
Notary Public for the State of Oregon.
My commission expires Feb. 20, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the copy of the within, admitted
at Portland, Oregon, this 5th day of January, 1922.

S. J. GRAHAM,
Of Attorneys for Defendant.

Filed January 5, 1922. G. H. Marsh, Clerk.
[24]

AND AFTERWARDS, to wit, on the 16th day of
November, 1922, there was duly filed in said
court, a stipulation waiving trial by jury in
words and figures as follows, to wit: [25]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEES CO., a Corporation, Now Known
as ALLEN MURPHY LUMBER CO., a
Corporation,

Defendant.

Stipulation Waiving Jury.

IT IS HEREBY STIPULATED, by and be-
tween the plaintiff above named, by its attorneys
Samuel B. Lawrence and John M. Boyle, and the

defendant above named, by its attorneys Messrs. Nash, Graham & Marsch, that the parties to this suit do hereby waive a jury, and ask that the same be tried by the Court.

Dated this 16th day of November, 1922.

SAMUEL B. LAWRENCE,

JOHN M. BOYLE,

Attorneys for Plaintiff.

L. J. GRAHAM,

Of Attorneys for Defendant.

Filed November 16, 1922. G. H. Marsh, Clerk.
[26]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, a stipulation to amend pleadings in words and figures as follows, to wit: [27]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE CO., a Corporation, Now Known
as ALLEN MURPHY LUMBER CO., a
Corporation,

Defendant.

Stipulation to Amend Pleadings.

IT IS HEREBY STIPULATED by and between the plaintiff, by its respective attorneys John M. Boyle and Samuel B. Lawrence, and the defendant, by its attorneys Messrs. Nash, Graham & Marsch, that the complaint, answer, and any other pleadings in this cause be hereby amended, shall be and the same is hereby amended in the following respect:

That wherever reference is made to the Allen Murphy Co., a corporation, the same be changed to read Allen Murphy Lumber Co., a corporation, and wherever reference is made to the O. R. Menefee Lumber Co., a corporation, the same be changed to read O. R. Menefee Co., a corporation.

Dated this 26th day of October, 1922.

SAMUEL B. LAWRENCE and

JOHN M. BOYLE,

Of Attorneys for Plaintiff.

NASH, GRAHAM & MARSCH,

Attorneys for Defendant.

Filed November 16, 1922. G. H. Marsh, Clerk.
[28]

AND AFTERWARDS, to wit, on the 4th day of December, 1922, there was duly filed in said court, findings of fact and conclusions of law in words and figures as follows, to wit: [29]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. W. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This action came regularly on for trial before the Honorable Robert S. Bean, one of the Judges of the above-entitled court, on the 16th day of November, 1922. The plaintiff was represented by Mr. Samuel B. Lawrence and Messrs. Boyle & Boyle and the defendant by Messrs. Wm. S. Nash and S. J. Graham. The parties duly filed, through their respective attorneys of record, a stipulation in writing waiving a jury trial and consenting that the action be tried by the Court without a jury. The Court having heard the testimony of the respective parties and the arguments of counsel and now at this time being fully advised in the premises finds the following facts:

I.

That the parties hereto are corporations.

II.

That the plaintiff has failed to sustain the aver-

ments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III.

That the alleged order is unilateral and wanting in mutuality.

IV.

That the parties hereto, through their respective [30] counsel, stipulated in open court that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated.

As conclusions of law the Court finds from the foregoing facts that the defendant is entitled to a judgment dismissing plaintiff's complaint with costs, and for a judgment against the plaintiff on defendant's counterclaim in the admitted sum of \$551.32, with interest thereon at 6% per annum from January 31, 1921, until paid.

Dated this 4th day of December, 1922.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within findings of fact and conclusions of law is hereby accepted in Multnomah County, Oregon, this 4th day of December, 1922, by receiving a copy thereof, duly certified

to as such by S. J. Graham, one of attorneys for defendant.

SAMUEL B. LAWRENCE,
Of Attorneys for Plaintiff.

Filed December 4, 1922. G. H. Marsh, Clerk.
By E. M. Morton, Deputy. [31]

AND AFTERWARDS, to wit, on Monday, the 4th day of December, 1922, the same being the 24th judicial day of the regular November term of said court. Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [32]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Judgment.

On this day this cause come on to be heard upon the application of the defendant for the entry of a judgment against the plaintiff in accordance

with the findings of fact and conclusions of law heretofore made and entered herein.

And it appearing to the Court that the application should be granted, it is

ORDERED that plaintiff's complaint be and the same is hereby dismissed with prejudice, and that the defendant do have and recover of and from the plaintiff the sum of \$551.32, together with legal interest thereon from January 31, 1921, until paid, and its costs and disbursements incurred herein, and that execution issue therefor.

Dated the 4th day of December, 1922.

R. S. BEAN,
Judge.

Filed December 4, 1922. G. H. Marsh, Clerk.
By E. M. Morton, Deputy. [33]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, a petition for writ of error in words and figures as follows, to wit: [34]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff and Plaintiff in Error,
vs.

O. R. MENEFEES LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,
Defendant and Defendant in Error.

Petition for Writ of Error.

Owen M. Bruner Company, a corporation, plaintiff in the above-entitled cause, conceiving itself aggrieved by the final order and judgment of this Court made and entered against it and in favor of the defendant on the 4th day of December, 1922, and rulings in said cause made as set forth in its assignment of errors herein filed, petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and relative thereto plaintiff respectfully shows:

That by reason of the premises plaintiff alleges manifest error has happened to the great damage of the Owen M. Bruner Company, a corporation, plaintiff herein.

That plaintiff has filed herewith its assignment of errors upon which it relies and will urge in the said Appellate Court: [35]

Wherefore, plaintiff prays that a writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, to this court, for the correction of the errors so complained of, and that transcript of the records, proceedings, papers and all things concerning the same upon which said judgment was made, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that plaintiff recover judgment as demanded in its complaint.

PLATT & PLATT, MONTGOMERY &
FALES,

Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

Service of the within petition for writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attorneys for Defendant

Filed June 2, 1923. G. H. Marsh, Clerk. [36]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, an assignment of errors in words and figures as follows, to wit: [37]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff above named, appearing by Messrs. Platt & Platt, Montgomery & Fales, its attorneys, and says that the judgment and final order of this Court made and entered in the above-entitled cause on December 4th, 1922, in favor of the defendant, O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, and against this plaintiff, is erroneous and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment and order, the following assignment of errors, which it avers occurred in the proceedings in said cause, upon which said final judgment is based:

I.

The above Court erred in its special finding of fact #2 as follows:

“That the plaintiff has failed to sustain the averments of its complaint, and in particular

has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint."

upon the ground and for the reason that the evidence is insufficient to sustain said finding, and upon the ground and for the further reason that the matter in controversy herein, related to a contract referred to in paragraph IV of the complaint, and that the order referred to in said special finding #3 was subsidiary [38] to the said contract, and that the said contract was made by letters and telegrams which were prepared by and in the language of the defendant company, and its officers and agents;

That said orders were subsidiary to said contract, and were not the contract itself, and that the affirmative answer shows that the contract between the plaintiff and defendant was made upon the letter of inquiry of November 14th, 1919, which was in the language of said Ashenfelter, and was submitted to and acted upon directly by the defendant itself, through its president, and the telegraphic correspondence, relative to said proposal, was in the language of and conducted by the officers of the said defendant with the said Ashenfelter, who in turn received the plaintiff's confirmation of said contract so made;

Upon the further ground that the evidence and the record show that:

(a) Paragraphs I and II of the plaintiff's complaint are admitted;

(b) That the divers citizenship of the respective parties, and the amount in controversy, were proven;

(c) That the contract referred to in said complaint was made by letter and telegraphic correspondence, as appears by the exhibits in evidence, to wit: (1) Plaintiff's Exhibit 23, and by telegrams passing between the defendant company and its agent, Ashenfelter, dated November 20th, 1919, and November 21st, 1919, and by correspondence between the defendant, through Ashenfelter, and the plaintiff, on November 21st and 22d, 1919, and by a letter from the defendant company to Ashenfelter dated November 24th, 1919, authorizing the making of said contract upon terms contained therein, which were accepted by plaintiff;

(2) The plaintiff opened negotiations with the defendant for the contract in question, by reason of defendant's letter to plaintiff of August 4th, 1919, and that Ashenfelter [39] acted as the Eastern manager of defendant company, advertised himself as such with defendant's knowledge, and his cards and letter-heads and stationery were printed with defendant's approval and at defendant's expense, and designated him as the eastern manager of defendant;

(3) That the original letter of inquiry dated November 14th, 1919, was susceptible of construction both as an inquiry for random widths and lengths of lumber, and for specific widths and lengths of lumber, and the orders for lumber

thereunder were within the limits of the ranges of sizes and lengths specified in said letter, and in the letter from defendant company to Ashenfelter dated November 24th, 1919;

(4) That the plaintiff offered to accept the performance of said contract as construed by defendant, and defendant never fulfilled said contract;

(5) That the telegram from defendant company to Ashenfelter, reading as follows:

“Letter tenth we have cancelled Bruner’s order 11385 account cannot furnish and ship specified lengths Nothing shipped on this order Account unable to secure cars

O. R. MENEFEE CO.”

gives specific reason for nonfulfillment of the contract and order, and does not specify or say that the contract is unilateral or lacking in mutuality, or raise any question of any misunderstanding on the contract itself, nor does it assert that there was any misunderstanding as to any of the terms of the contract itself;

(6) That the lumber involved within the contract so made by the letter of November 14th, 1919, and the telegrams referred to, increased in price after the making of said contract to an amount which sustained plaintiff’s claim for damages as set forth in the complaint;

(7) That the orders so placed by plaintiff were within [40] the limits of the specifications of the contract, and that plaintiff offered to accept the performance of said contract as construed by defendant.

(d) That the plaintiff, relying upon the above agreement, and at plaintiff's great cost and expense, advertised and offered for sale to its clients the stock of lumber involved therein;

(e) That the orders referred to in said finding are shipping instructions;

(f) That the defendant refused to fulfill its contract with plaintiff, and cancelled the order so given;

(g) That plaintiff made demands on defendant to fulfill said agreement, but defendant neglected, failed and refused to do so;

(h) That the average cars of Douglas fir rough lumber consist of from 21,000 feet to 28,000 feet;

(i) At the time defendant refused to fulfill its contract with plaintiff, the said lumber had advanced approximately \$16.50 per thousand in price;

(j) The amount of plaintiff's damages are capable of actual ascertainment.

II.

The above-entitled Court erred in its special finding #3 as follows:

“That the alleged order is unilateral and wanting in mutuality”

upon the ground that the evidence is insufficient to sustain said finding, and the evidence shows that the defendant did not assign such ground or reason for cancelling the orders. In support of the specifications of insufficiency to support this said finding, the plaintiff, and plaintiff in error, refers to the designations heretofore set forth under

error #1, showing wherein the evidence is [41] insufficient to sustain special finding #2, and incorporates them herein as if set forth at length hereat.

III.

The above-entitled Court erred in its conclusions of law as follows:

“That the defendant is entitled to a judgment dismissing the plaintiff’s complaint with costs, and for a judgment against the plaintiff on defendant’s counterclaim in the admitted sum of \$551.32, with interest thereon at 6% per annum from January 31st, 1921, ’till paid,”

upon the ground and for the reasons set forth in the specifications of insufficiency of evidence to sustain the Court’s special finding #2, and also to sustain the Court’s special finding #3, and also upon the following grounds:

(a) That by the evidence, the right of the plaintiff to recover the sum sought in its complaint was established, and that the counterclaim in favor of the defendant should have been credited upon said amount, and that no judgment should have been rendered in favor of the defendant, but an affirmative judgment should have been rendered in favor of the plaintiff, and against the defendant for the difference between the amount plaintiff owed defendant, and the amount alleged in the complaint as plaintiff’s claim.

IV.

The above-entitled Court erred in entering judg-

ment in favor of the defendant, and against the plaintiff, for any sum whatsoever, and erred in not entering judgment in favor of the plaintiff, and against the defendant, for the difference between the amount claimed in the complaint, and the counterclaim which plaintiff owed defendant.

V.

The Honorable Court erred in rendering judgment dismissing plaintiff's complaint, and disallowing plaintiff's claim, upon the ground that the special findings of the Court do not support [42] the judgment, and are not supported by the pleadings or the record.

VI.

The Honorable Court erred in not finding damages to plaintiff in a definite amount, and in not crediting the amount of the counterclaim admitted to exist in favor of defendant against plaintiff upon such sum, and erred in not rendering judgment for the excess over said counterclaim of plaintiff's claim, in favor of plaintiff.

WHEREFORE, the said plaintiff, and plaintiff in error, prays that the judgment of said Court be reversed, and such directions be given that full force and efficacy may inure to the plaintiff by reason of the cause of action set up in its complaint, and that judgment be entered in favor of the plaintiff in accordance with the demand of its complaint filed in said cause.

PLATT & PLATT, MONTGOMERY &
FALES,

Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

Service of the within assignment of errors, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attorneys for Defendant.

Filed June 2, 1923. G. H. Marsh, Clerk. [43]

AND AFTERWARDS, to wit, on Saturday, the 2d day of June, 1923, the same being the 74th judicial day of the regular March term of said court. Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [44]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEЕ LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Order Allowing Writ of Error, Staying Proceedings and Fixing the Amount of Bond.

This 2d day of June, 1923, came the plaintiff, above named, Owen M. Bruner Company, appearing by Messrs. Platt & Platt, Montgomery & Fales, its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error from the decision and judgment of this Court, made and entered herein on the 4th day of December, 1922, in favor of O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, the defendant above named and against said plaintiff, and the rulings made upon the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit, to this court, together with its assignment of errors intended to be urged by it within due time, and also praying that a transcript of the record and proceedings and papers upon which the said judgment herein was rendered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon said writ or error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other

and further proceedings [45] may be had as may be proper in the premises.

NOW, THEREFORE, on consideration thereof, this Court does allow said writ of error upon said plaintiff filing with the clerk of this court a good and sufficient bond in the sum of Fifteen Hundred Dollars (\$1500.00); to the effect that if the said plaintiff, Owen M. Bruner Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if plaintiff fails to make its complaint good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the Court, and it is ordered that all further proceedings in this court be, and the same are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and that said bond shall operate as a supersedeas bond.

Dated this 2d day of June, 1923.

CHAS. E. WOLVERTON,
Judge.

Filed June 2, 1923. G. H. Marsh, Clerk. [46]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, a bond on writ of error in words and figures as follows, to wit: [47]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Bond on Writ of Error and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS,
that we, the Owen M. Bruner Company, a corporation,
principal, and American Surety Company of New York,
a corporation, surety, are held and firmly bound unto
O. R. Menefee Lumber Co., a corporation, now known as
Allen Murphy Co., a corporation, the above-named
defendant, in the sum of Fifteen Hundred Dollars
(\$1500.00), to be paid to the said O. R. Menefee
Lumber Co., a corporation, now known as Allen
Murphy Co., a corporation, its successors and assigns,
to which payment well and truly to be made we bind
ourselves and each of us, jointly and severally, and
our and each of our successors or assigns, firmly by
these presents.

Sealed with our seals and dated this 2d day of
June, 1923.

WHEREAS, the above-named Owen M. Bruner
Company, a corporation, is prosecuting a writ of

error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 4th day of December, 1922.

NOW, the consideration of this obligation is such that if the above-named Owen M. Bruner Company, a corporation, shall [48] prosecute said writ of error to effect, and answer all costs and damages if it shall fail to make good its complaint, then this obligation to be void; otherwise to remain in full force and effect.

OWEN M. BRUNER COMPANY.

By Isham N. Smith,
Attorney.

AMERICAN SURETY CO. OF NEW
YORK.

By W. A. King,
Resident Vice-President.

[Seal]

Attest: E. LIEMAN,
Resident Agent. Sec.
W. A. KING,
Agent.

Examined and approved this 2d day of June,
1923.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District of Oregon,—ss.

Service of the within bond on writ of error and supersedeas bond by certified copy thereof, as re-

quired by law, is hereby acknowledged at Portland, Oregon, this —— day of June, 1923.

S. J. GRAHAM,

Of Attorneys for Defendant.

Filed June 2, 1923. G. H. Marsh, Clerk. [49]

AND AFTERWARDS, to wit, on the 14th day of June, 1923, there was duly filed in said court, the evidence introduced at trial of the cause, in words and figures as follows, to wit: [50]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFFEE LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY CO., a
Corporation,

Defendant.

**Certificate of the Judge Identifying Testimony
Given at the Trial of Said Cause.**

United States of America,
State and District of Oregon,—ss.

I, Robert S. Bean, Judge of the above court, who tried the above cause, do hereby certify that the following evidence, and none other, was introduced at the trial of the above cause, to wit:

(1) The depositions of Owen M. Bruner and W. C. Ashenfelter, now on file in the above cause, taken at Philadelphia, Pennsylvania;

(2) The oral testimony of witnesses, J. E. Manley and J. P. Keating on behalf of the plaintiff, and H. B. Van Duzen on behalf of the defendant, as transcribed and certified by Mary E. Bell, official stenographer who reported said cause.

A copy of all said evidence and depositions certified as true by the clerk of the above court, is attached hereto.

Dated at Portland, Oregon, this, the 12th day of June, 1923.

R. S. BEAN,
Judge. [51]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY CO., a
Corporation,

Defendant.

Philadelphia, Pa., Thursday, June 29, 1922.

Owen M. BRUNER	1
Cross	34
Redirect	57
Recross	62
W. C. ASHENFELTER	64
Cross	79
Redirect	95
Recross	102

EXHIBITS:

Plaintiff's Ex. No. 1	3
(Letter dated 8-4-1919, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Plaintiff's Ex. No. 2	4
(Letter dated August 11, 1919, from Owen M. Bruner Co., to O. R. Menefee Co.)	
Plaintiff's Ex. No. 3	6
(Name card of O. R. Menefee Company.)	
Plaintiff's Ex. No. 4	9
(Order dated Nov. 21, 1919, from Owen M. Bruner Co. to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 5	11
(Letter dated Nov. 22d, '19, from W. C. Ashenfelter to Owen M. Bruner Co.)	
Plaintiff's Ex. No. 6	13
(Order dated Nov. 25, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter and corrected order of Nov. 25, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 7	16

(Sub-order dated Dec. 13, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)

Plaintiff's Ex. No. 8 18

(Order dated Dec. 29, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)

Plaintiff's Ex. No. 9 20

(Telegram dated Dec. 19th, 1919, from O. R. Menefee Co. to W. C. Ashenfelter.)

Plaintiff's Ex. No. 10 21

(Letter dated Dec. 18, 1919, from O. R. Menefee Co., to W. C. Ashenfelter.)

[52]

Plaintiff's Ex. No. 11 23

(Letter dated 12-20-19, from Owen M. Bruner Co., to W. C. Ashenfelter.)

Plaintiff's Ex. No. 12 25

(Letter dated 1-20-20, from Owen M. Bruner Co. to W. C. Ashenfelter.)

Plaintiff's Ex. No. 13..... 27

(Letter dated 1-31-20, from Owen M. Bruner Co., to W. C. Ashenfelter.)

Plaintiff's Ex. No. 14 29

(Letter dated Sept. 3d, 1920, from Owen M. Bruner Co., to Allen-Murphy Lumber Co., successors to O. R. Menefee Co.)

Defendant's Ex. No. 15 37

(Letter dated Feb. 27, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)

Defendant's Ex. No. 16 38

(Letter dated March 19, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)

Defendant's Ex. No. 17 39

(Letter dated April 21, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 18	40
(Letter dated May 19, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 19	40
(Letter dated June 17, 1920, from Allen-Murphy Lumber Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 20	41
(Letter dated July 29, 1920, from Allen-Murphy Lumber Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 21	42
(Letter dated Aug. 27, 1920, from Allen-Murphy Lumber Co. to Owen M. Bruner Co.)	
Defendant's Ex. No. 22	50
(Letter dated Dec. 2, 1919, from O. R. Menefee Co. to W. C. Ashenfelter.)	
Defendant's Ex. No. 23	56
(Letter dated Nov. 14, '19, from W. C. Ashenfelter to O. R. Menefee Co.)	
Plaintiff's Ex. No. 24	66
(Printed envelope.)	
Plaintiff's Ex. No. 25	67
(Printed envelope.)	
Plaintiff's Ex. No. 26	70
(Telegram dated Nov. 20, 1919, from O. R. Menefee Co.; to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 27	71

(Telegram dated Nov. 21, '19, from W. C.
Ashenfelter to O. R. Menefee Co.)

Plaintiff's Ex. No. 28 72

(Letter dated Nov. 24, 1919, from O. R.
Menefee Co. to W. C. Ashenfelter.)

Defendant's Ex. No. 29 87

(Letter dated Dec. 23, 1919, from O. R.
Menefee Co., to W. C. Ashenfelter.)

Defendant's Ex. No. 30 88

(Letter dated Dec. 30, 1919, from O. R.
Menefee Co., to W. C. Ashenfelter.)

Defendant's Ex. No. 31 89

(Letter dated Feb. 2, 1920, from O. R.
Menefee Co. to W. C. Ashenfelter.)

Plaintiff's Ex. No. 32 96

(Letter dated Jan. 10, '20, from W. C.
Ashenfelter to O. R. Menefee Co.) [53]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY Co., a
Corporation,

Defendant.

Depositions of Owen M. Bruner and W. C. Ashenfelter, witnesses on behalf of the plaintiff, taken pursuant to agreement of counsel, before T. Roy Phillips, Esq., notary public, at Room 1100 Land Title Building, Philadelphia, Pa., on Thursday, June 29, 1922, at 3 P. M.

Present: ARTHUR E. WEIL, Esq., and
ALBERT L. MOISE, Esq., representing the plaintiff.

S. J. GRAHAM, Esq., representing the defendant.

Deposition of Owen M. Bruner, for Plaintiff.

OWEN M. BRUNER, having been duly sworn, was examined and testified as follows:

(By Mr. MOISE.)

Q. What is your full name?

A. Owen M. Bruner.

Q. And your business?

A. Wholesale lumber business, the buying and selling of lumber.

Q. What relation have you to the Owen M. Bruner Company, the plaintiff in this case?

A. President.

Q. How long have you been in the lumber business?

A. I have been in business since 1894, but I have been in the business practically since 1882.

Q. Have you as the president and acting for the Owen M. Bruner Company had any dealings with the O. R. Menefee Lumber Company, of Portland, Oregon? A. Yes, sir.

(Deposition of Owen M. Bruner.)

Q. I show you a letter dated 8-4-1919 on the letter-head of the O. R. Menefee Company, purporting to be signed by O. R. Menefee, addressed to Owen M. Bruner Company, and ask you if you received that letter [54] from said company? A. Yes, sir.

Q. Is that letter in reply to a letter addressed by you to the O. R. Menefee Company? A. Yes, sir.

Q. Have you a copy of the letter to which that is a reply?

A. I have not got it here. According to the contents of this letter, it refers to a Myerstown order.

Q. Never mind reading it. A. All right.

Mr. MOISE.—I offer that letter in evidence.

Letter dated 8-4-1919, signed by O. R. Menefee, addressed to the Owen M. Bruner Company, marked Plaintiff's Exhibit No. 1, June 29, 1922, T. R. P., reading as follows:

Plaintiff's Exhibit No. 1.

“8-4-1919.

Stamp

Owen M. Bruner Co., Phila.,

Rec'd Aug. 9, 1919.

“Owen M. Bruner Company,
Colonial Trust Building,
Philadelphia, Pa.

“Gentlemen:

We have your esteemed favor of July 29th, and note that you do not apprehend any trouble with the Myerstown order.

For your information we have the best salesman in the United States, located in Philadelphia, Mr. W. C. Ashenfelter, Builders Exchange Building. In the future you will please take any matters pertaining to prices, up with him, and you will get quicker results than if you wrote here.

By the way; your prices offered on timbers, lengths, thirty-six to forty feet, is exactly \$4.50 too low. We are shipping all the timbers we can make on \$24.00 basis, and that means all lengths, twelve to forty feet.

We hope to do a nice business with you this year and invite your inquiries. We are very strict on our terms, however, and until we get better acquainted we expect ninety per cent cash within [55] fifteen days from date of invoice.

“Yours very truly,

“O. R. MENELEE.”

ORM:ER

Mr. MOISE.—I call for the original of the reply to the above letter dated August 11, 1919, from the Owen M. Bruner Company to the O. R. Menefee Company.

(Original not produced.)

Mr. MOISE.—I offer in evidence copy of letter dated August 11, 1919, from Owen M. Bruner Company to O. R. Menefee Company.

Mr. GRAHAM.—It is objected to as incompetent, immaterial and irrelevant.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Did you reply to that letter (Plaintiff's Exhibit No. 1)? A. Yes, sir.

Q. Is this the copy? A. Yes, sir.

Q. That is your reply?

A. Yes, sir, that is my answer.

Mr. MOISE.—I offer that copy in evidence.

Mr. GRAHAM.—I make the same objection.

(The copy is marked Plaintiff's Exhibit No. 2, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 2.

“August 11, 1919.

“O. R. Menefee Company,
Portland, Oregon.

“Gentlemen:

Replying to yours of the 4th inst., we must have the 10 pcs. 2x10-40 omitted from the Myerstown order. You can fill out the balance of the car with 6x6, 8x8, 3x10, 3x12-36' to 40' long, Choice #1 Common in the rough at a price of \$50.50 delivered f. o. b. cars Atlantic City, N. J. We are more than splitting the difference with you on this transaction.
[56]

If you will look up your letters of July 18th, you will note that you stated you would ship the 10 pcs. 2x10-40 which we must have. We want these 2x10-40 shipped in the first car for reshipment to Myerstown. Let the second car containing the 6x8, 8x8, 3x10, 3x12 come along as soon as possible.

(Deposition of Owen M. Bruner.)

In regard to the second paragraph of your letter we are glad that you appreciate Mr. W. C. Ashenfelter, one of our fellow citizens, whom we have known for many years, as a thorough salesman and you are telling us nothing new when you acknowledge that you have 'the best salesman in the United States.'

Relative to terms. We desire to discount our purchase for 80% of the invoice or 90%, if that is your custom, but we must have the invoice in hand to do this. These are the terms agreed upon with Mr. Ashenfelter at time of purchase.

Please let us hear from you relative to the shipment to Atlantic City, and oblige,

"Yours very truly,

"OWEN M. BRUNER COMPANY."

OMB-D

CC-W. C. Ashenfelter.

(By Mr. MOISE.)

Q. Did you receive a card with the name of "O. R. Menefee Company, W. C. Ashenfelter, Eastern Manager, Builders Exchange, Philadelphia" printed thereon? A. Yes, sir.

Q. Is that the card? A. Yes, sir.

Mr. MOISE.—I offer that card in evidence.

Mr. GRAHAM.—It is objected to as incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings in this suit.

The card is marked Plaintiff's Exhibit No. 3, June 29, 1922, T. R. P., reading as follows: [57]

(Deposition of Owen M. Bruner.)

Plaintiff's Exhibit No. 3.

“O. R. MENEFEE COMPANY,

“Douglas Fir Company,

“Timbers a Specialty.

“1400 Yeon Building, Portland, Oregon.

“W. C. Ashenfelter,

Eastern Manager,

Builders' Exchange, Philadelphia.”

(By Mr. MOISE.)

Q. Did you show to W. C. Ashenfelter the letter which you received from the O. R. Menefee Lumber Company, which has been offered in evidence, marked Plaintiff's Exhibit No. 1 in this case?

A. Yes, sir.

Q. Did you have any dealings with W. C. Ashenfelter acting as the representative of the O. R. Menefee Lumber Company in November, 1919?

Mr. GRAHAM.—That is objected to on the ground that the question assumes a fact not proven. The agency, if any, disclosed by the letter, which has been offered in evidence, is a special and limited agency, and the evidence sought to be elicited is incompetent, immaterial and irrelevant. A. Yes, sir.

(By Mr. MOISE.)

Q. Had you had any dealings with the O. R. Menefee Lumber Company through W. C. Ashenfelter prior to November, 1919?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and ir-

(Deposition of Owen M. Bruner.)

relevant, and not within the issues made in the pleadings. A. Yes, sir.

(By Mr. MOISE.)

Q. What was the nature of those transactions?

Mr. GRAHAM.—The same objection.

A. The purchases of lumber from Ashenfelter which were filled by Menefee.

Q. And for whom was Ashenfelter acting in those transactions?

Mr. GRAHAM.—The same objection.

A. For Menefee. [58]

(By Mr. MOISE.)

Q. And how many such transactions took place?

Mr. GRAHAM.—The same objection.

A. Three or four. Possibly more.

(By Mr. MOISE.)

Q. Extending over what period of time?

Mr. GRAHAM.—The same objection.

A. Several months.

(By Mr. MOISE.)

Q. As a result of your negotiations with W. C. Ashenfelter, acting as the representative of the O. R. Menefee Lumber Company in November, 1919, did you give him an order for the purchase of lumber?

Mr. GRAHAM.—That is objected to for the reason that it assumes a fact not proven, and for the further reason that it is incompetent, immaterial and irrelevant. It tends to prove a contract not pleaded in the complaint. A. Yes, sir.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. What was the date of November, 1919, on which you gave him the original order?

Mr. GRAHAM.—That is objected to on the ground that it is immaterial incompetent and irrelevant, and not within the issues made in the pleadings.

A. November 21st.

(By Mr. MOISE.)

Q. I show you a paper dated November 21, 1919, addressed to W. C. Ashenfelter, and signed by Owen M. Bruner Company, and ask you to state what that is.

Mr. GRAHAM.—That is objected to, on the ground that it is incompetent, immaterial and irrelevant. [59]

A. This order of November 21, 1919, is the result of a purchase made from Mr. Ashenfelter and a sale to him by me. He returned this letter stating that the price was not according to our understanding, and there is a notation here in Mr. Ashenfelter's handwriting, "Returned for correction in price."

Mr. MOISE.—I offer that paper in evidence.

Mr. GRAHAM.—I object to it on the ground that it is incompetent, irrelevant and immaterial, and not within the issues made in the pleadings.

The paper is marked Plaintiff's Exhibit No. 4, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 4.

“Send all invoices with Bill of Lading to this office.

Order No. 11384.

Please enter the above number on your invoice.
Southard's Code Used.

OWEN M. BRUNER COMPANY.

WHOLESALE LUMBER.

(Stamp) Owen M. Bruner Co., Phila.

Rec'd Nov. 24, 1919.

Philadelphia, Pa., Phila., November 21, 1919.

To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Penna.

Please ship from Owen M. Bruner Company to
Owen M. Bruner Company at shipping instructions
to be supplied

Railroad delivery to be supplied

Enter in bill lading

Rate not to exceed ———

Route via ———

#1 COMMON DOUGLAS FIR—ROUGH

25 cars 4x4 to 12x12 (with some larger sizes) 12
to 40' long. Price delivered on a New York
or 80¢ rate\$46.50 M.
Price delivered on a 78¢ rate of freight

..... 46.00 M.

To be shipped in sizes and lengths as wanted.
We shall immediately begin a campaign for orders
and will send same in to you as [60] soon as
we book the business.

(Deposition of Owen M. Bruner.)

This covers order given you over 'phone this afternoon;

Acknowledge.

Prices F. O. B. cars as above. Cash Discount 2%.
Commission — (in pencil) Returned for correction in price.

When to ship As wanted.

Please acknowledge receipt of this order by return mail.

Yours truly,

OWEN M. BRUNER CO.

OMB—D

Do not Stencil your Name or Advertisement on Car."

(By Mr. MOISE.)

Q. When Mr. Ashenfelter returned that paper, did he send you a letter?

A. He did, under date of November 22, 1919. This letter is written on Menefee's letter-head, with the name of W. C. Ashenfelter, Eastern Manager, Builders' Exchange, Philadelphia, Pa., thereon, showing the authority for Ashenfelter's statement in the letter that he made a mistake in the price of \$46, and it should be \$48. We corrected the typographical error, and sent him an order to conform to the understanding correcting the price.

Mr. GRAHAM.—I move to strike out the answer of the witness as a conclusion. The instrument speaks for itself.

Mr. MOISE.—I offer that letter in evidence.

(Letter marked Plaintiff's Exhibit No. 5, June 29, 1922, T. R. P.)

Mr. GRAHAM.—I object to the reception in evidence of the letter just offered on the ground that it is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The letter reads as follows:

Plaintiff's Exhibit No. 5.

“W. C. Ashenfelter, Eastern Manager

“Builders' Exchange

“Philadelphia, Pa.

B. W P

OWEN M. BRUNER CO., Phila.

Rec'd Nov. 24, 1919

Answered

Int. — File —

1 2 3 4

Philada.

~~Portland, Oregon~~ Nov. 22d-19

[61]

“Messrs. Owen M. Bruner Co.,

“Philada.

“Gentlemen:

“I am just in receipt of your favor of the 21st inst., confirming telephone order, but hasten to call your attention to the fact that you have noted \$46.00 instead of \$48.00. I do not know whether this is a typographical error or what, but you could not have misunderstood me over the phone,

(Deposition of Owen M. Bruner.)

as you repeated the prices to me yourself two or three times, saying \$48.00 on Philada frt rate and to make it \$48.50 on N. Y. rate, after my phoning you as plainly as I could speak that the best Menefee could do would be \$48.00 and that he would only accept half of the order at that, or about twenty-five cars, and them for immediate wire acceptance.

“I also mailed you a confirmation of my telegram to Menefee so as to cinch his offer before he could have time to raise the price.

“Will you therefore please correct the prices in your letter of the 21st, which I am taking the liberty to return herewith for such correction, and oblige.

“Yours very truly,

W. C. ASHENFELTER.”

WCA-A.

(By Mr. MOISE.)

Q. Did you send a corrected order to Ashenfelter? A. Yes, sir.

Q. I show you a paper dated November 25, 1919, signed Owen M. Bruner Company, addressed to W. C. Ashenfelter, and ask you what that is?

A. This is the corrected order in answer to Ashenfelter's letter of the 22d correcting the price, so stated in the corrected order, and on the order is written by Ashenfelter, “referred to O. R. M. Company, Ash, 11-25-19.” I also have here an acceptance of the order, “W. C. Ashenfelter, Agent for O. R. Menefee Company.”

Mr. MOISE.—I offer that paper in evidence as Plaintiff's Exhibit No. 6. [62]

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

Plaintiff's Exhibit No. 6 reads as follows:

Plaintiff's Exhibit No. 6.

"Send all invoices with bill of Lading to this Office.

Order No. 11385.

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY.

Wholesale Lumber.

Southard's Code used.

Philadelphia, Pa., November 25, 1919.

To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Pa.

Please ship from Owen M. Bruner Company to Owen M. Bruner Company at Shipping instructions to be supplied.

Railroad Delivery To be supplied.

Enter in Bill Lading

Rate not to exceed —

Route via —

#1 COMMON DOUGLAS FIR—ROUGH.

25 cars 2x4 to 12x12 (with some larger sizes) 12 to 40 ft. long. Price delivered on a New York or 80¢ rate \$48.50
Price delivered on a 78¢ rate of freight 48.00

To be shipped in sizes and lengths as wanted.
We shall immediately begin a campaign for orders
and will send same to you as soon as we book the
business.

This order covers order given you over 'phone
on November 21st, and bears correction as per
your letter of the 22d inst.

Prices F. O. B. Cars As above

Commission Cash Discount 2%

When to Ship As wanted.

Please acknowledge receipt of this order by re-
turn mail.

Yours truly,

OWEN M. BRUNER & CO.

OMB-O

(In ink) Referred to

O. R. M. Co.

Ash. 11-25-19

Do not Stencil Your name or Advertisement on
Car." [63]

"11385

"November 25, 1919.

W. C. Ashenfelter, Builders' Exchange, Philadel-
phia, Pa., from Owen M. Bruner Company to
Owen M. Bruner Company

Shipping instructions to be supplied

To be supplied

#1 COMMON DOUGLAS FIR—ROUGH

25 cars 2x4 to 12x12 (with some larger sizes) 12 to
40 ft. long. Price delivered on a New York
or 80¢ rate \$48.50
Price delivered on a 70¢ rate of freight 48.00

(Deposition of Owen M. Bruner.)

To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as we book the business.

This order covers order given you over 'phone on November 21st, and bears'correction as per your letter of the 22d inst.

As above

As wanted

W. C. Ashenfelter.

Agt.

2%

For O. R. Menefee Co."

OMB-D

(By Mr. MOISE.)

Q. Did you subsequent to November 25, 1919, send to W. C. Ashenfelter, as Agent of O. R. Menefee Company, shipping instructions for some of the lumber described in said order?

Mr. GRAHAM.—I object to that question because it assumes a fact not proven, and it is incompetent, immaterial and irrelevant, and not within any of the issues made in the pleadings.

A. I did. On December 13, 1919, we sent an order, or a suborder to apply on the original purchase. That is a miscellaneous list of sizes.

Mr. MOISE.—I offer that in evidence.

Mr. GRAHAM.—I object to the reception of that paper in evidence on the ground that it is incompetent, immaterial and irrelevant, and does not tend to prove any of the issues made by the pleadings. [64]

The paper is marked Plaintiff's Exhibit No. 7,
June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 7.

"Send all invoices with Bill of Lading to this
Office.

Order No. 11385-A (To apply on our purchase of
11-25-19)

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY,
Wholesale Lumber.

Southard's Code used.

Philadelphia, Pa., December 13, 1919.

To W. C. Ashenfelter, Builders' Exchange, Phila-
delphia, Penna.

Please Ship from Owen M. Bruner Company to
Owen M. Bruner Company at Hammonton, New
Jersey

Railroad Delivery	Philadelphia & Reading
Enter in Bill Lading	Rate not to exceed —
	Route via —

#1 COMMON DOUGLAS FIR ROUGH

A. 2x 6—50-24, 20-32, 20-28)	
B. 2x 8—50-24, 20-32, 20-28)	
C. 3x 6—10-32, 10-24)	
D. 3x 8—10-20, 10-24, 10-28, 10-32)	
E. 3x12—10-20, 10-24, 10-28, 10-32, 10-36)	at \$48.50
F. 4x 6—25-24, 20-32, 10-36)	
G. 6x 6—10-24, 10-28, 10-32, 5-40)	
H. 8x 8—10-20, 10-24, 10-32, 5-40)	
I. 6x 8—10-20, 10-24, 10-32, 5-40)	

(Deposition of Owen M. Bruner.)

This order makes a total of about....28,000 ft.

This is to apply on our purchase, order #11385 sent you under date of the 25th ulto.

(In pencil) Ash's

#123

12-15-19

Prices F. O. B. cars Hammonton, N. J. (80c rate of freight.)

Commission —

Cash Discount 2%

When to ship. As soon as possible.

Please acknowledge receipt of this order by return mail.

CC-O. R. Menefee Co.

Yours truly,

OWEN M. BRUNER CO.

OMB-D

Do not Stencil Your Name or Advertisement on Car." [65]

(By Mr. MOISE.)

Q. You call that paper a suborder. Please explain what you mean by that.

A. I mean by "Suborder" that it is a portion of the whole. It is a portion of the original order for 25 cars. This is one of the 25 cars.

Q. I show you another paper dated December 29, 1919, signed by Owen M. Bruner Company, addressed to W. C. Ashenfelter, and ask you what that paper is.

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

(Deposition of Owen M. Bruner.)

A. This paper is dated December 29, 1919, and was given to apply as another order of miscellaneous sizes on the original order.

Mr. MOISE.—I offer that paper in evidence.

Mr. GRAHAM.—It is objected to on the ground that is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The paper is marked Plaintiff's Exhibit No. 8, June 29, 1922, T. R. P. and reads as follows:

Plaintiff's Exhibit No. 8.

“Send all invoices with Bill of Lading to this Office.

Order No. 11385-B.

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY

Wholesale Lumber

Southard's Code used.

Philadelphia, Pa., December 29, 1919.

To W. C. Ashenfelter, Wissahickon & Coulter St.,
Philadelphia, Pa.

Please ship from Owen M. Bruner Company to
Owen M. Bruner Company at Attica, New York.
Railroad Delivery. Erie Delivery.

Enter in Bill Lading.

Rate not to exceed ——

Route via —— [66]

(Deposition of Owen M. Bruner.)

#1 DOUGLAS FIR—ROUGH (#1 COMMON)

A.	8x 8—	20-24	20-28	20-32	}	at \$48.50 delivered on a New York or 80c rate of freight
B.	6x 8—	30-32				
C.	6x 6—	40-32				
D.	4x 6—	100-24	40-16			
E.	4x 4—	100-16	200-20	100-24		
F.	2x12—	100-34	100-32	100-30		
G.	2x10—	100-28				
H.	10x10—	10-28	20-32			

This order applies on our order of #11385 given you on Nov. 25th, and we are noting that you are sending this order out to the mill, as per your conversation over the 'phone this morning.

Our customer wants a wire answer as to when he may receive this shipment.

(In pencil) Ash's #124

12-29-19

Prices F. O. B. cars 80 cent rate of Freight or Attica, New York.

Commission —

Cash Discount 2%

When to ship. As soon as possible.

Please acknowledge receipt of this Order by return mail.

Yours truly,

OWEN M. BRUNER CO.

OMB-GEB

Do not Stencil Your name or Advertisement on car."

(By Mr. MOISE.)

Q. After you sent the shipping instructions, which have been referred to in your last answer, what

(Deposition of Owen M. Bruner.)

was the next thing that you learned with respect to the delivery of lumber under the order?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant.

A. Mr. Ashenfelter called at my office during my absence leaving a telegram which was received from Menefee.

Q. Is that the telegram?

A. Yes, sir, this is the telegram.

Mr. MOISE.—I offer that telegram in evidence.

Mr. GRAHAM.—I object to the reception in evidence of that telegram on the ground that it is incompetent, immaterial and [67] irrelevant, and not within any of the issues made by the pleadings.

The telegram is marked Plaintiff's Exhibit No. 9, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 9.

“Received at 33 S. 10th St.

C 55PNC 29 Blue

YN Portland Ore 1112 AFDEC

19th 1919

W. C. Ashenfelter 205

Blers Exchange Bldg Phila Pa.

Letter tenth we have cancelled Bruners order one one three eight five account cannot furnish and ship specified lengths nothing shipped on this order account unable to secure cars

O. R. MENELEE CO.

335P”

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Did Ashenfelter show you a letter which he received from the Menefee Company confirming the telegram just offered in evidence?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant. A. Yes, sir.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—The same objection.

The letter is marked Plaintiff's Exhibit No. 10, June 29th, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 10.

“December 18, 1919.

(Stamp) B W P K

Owen M. Bruner Co., Phila.

Rec'd Dec 30 1919

Answered

Int ——— File ———

1 2 3 4

“Mr. W. C. Ashenfelter,
Builders' Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir:

Herewith confirmation our wire this date. In reference [68] to Bruner order we are returning herewith his orders 11385 and 11385A as his orders did not conform to the way in which originally was accepted we cannot see our way clear to handle it as we could not load this material in specified lengths and widths “as you realize the market on

(Deposition of Owen M. Bruner.)

this stock is now ten dollars higher than what we quoted."

If he wishes prices on material similar to his order 11385-A we would be pleased to quote prices.

"Yours truly,

"O. R. MENEFEE COMPANY,

"BY _____."

OFT-ER

(By Mr. MOISE.)

Q. After the order for the 25 cars, which has been offered in evidence, was accepted, what, if anything, did you do in an effort to sell the lumber which you ordered from the Menefee Company?

Mr. GRAHAM.—That is objected to on the ground that it assumes a fact not proven, and on the further ground that the testimony sought to be elicited is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

A. We made a diligent effort to sell the lumber, went to considerable time and expense of salesmen, thousands of letters, and by the use of various trade journals, advertising our purchase and what we had for sale.

Mr. GRAHAM.—I move to strike out that portion of the answer of the witness where he says he made a diligent effort to dispose of the lumber covered by this alleged order for the reason that it is a conclusion.

(By Mr. MOISE.)

Q. After Mr. Ashenfelter showed you the telegram from Menefee, wherein they cancelled the or-

(Deposition of Owen M. Bruner.)

der, which telegram has been offered in evidence, did you write any letters to Mr. Ashenfelter with respect to the matter? [69]

Mr. GRAHAM.—That is objected to on the ground that transactions between the witness and Ashenfelter are immaterial. A. Yes, sir.

Mr. MOISE.—I call for the original of letter dated 12-20-1919 from Owen M. Bruner Company to W. C. Ashenfelter.

(Original produced.)

(By Mr. MOISE.)

Q. I show you original letter dated 12-20-1919 from Owen M. Bruner Company to W. C. Ashenfelter and ask you if you sent that letter to W. C. Ashenfelter?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant.

A. I did.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The letter is marked Plaintiff's Exhibit No. 11, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 11.

“12-20-19.

“(In pencil) Rec'd 12-30

“Mr. W. C. Ashenfelter,
Builders' Exchange,
Philadelphia, Pa.

Our Order #11385 11-25-19

“Dear Sir:

I regret that I was not in the office when you called yesterday. However, I have before me the telegram sent you by the O. R. Menefee Company, which reads as follows:

‘Letter tenth we have cancelled Bruner order one one three eight five account cannot furnish and ship specified lengths nothing shipped on this order account unable to secure cars’

The Menefees have no right to cancel this order without our consent. We did not consent to it, therefore, we expect them [70] to furnish it. If they want us to go out on the market and buy against their account, we shall do so, but the Menefee Company is too big and broad-minded to have this done.

In the latter portion of their telegram they say this order cannot be shipped on “account unable to secure cars.” There is no hurry for shipment. You have our order #11385-A, your order #123, to apply on our original purchase, order #11385. In accepting this order on the 15th inst., you omitted the “11” in naming our order number, same should be #11385-A. Now, this lumber for Hammonton

(Deposition of Owen M. Bruner.)

on this order can be shipped when they get cars because it is wanted for next spring's trade.

Therefore, the Menefee people need not feel that we are pushing them for shipment on this order because they are unable to secure cars at this time.

Please acknowledge receipt, and oblige.

“Yours very truly,

(In Pencil)

“OWEN M. BRUNER COMPANY.

“OWEN M. BRUNER.”

Referred to O. R. M. Co.

Ash 12-22-19

OMB-D

Mr. MOISE.—I call for the original of letter dated 1-20-20, from the plaintiff to Ashenfelter.

(Original not produced.)

Mr. MOISE.—I will offer this carbon copy of the original of 1-20-20.

(By Mr. MOISE.)

Q. Do you identify that letter? A. Yes, sir.

Q. What is it?

A. This is a letter dated January 20, 1920, concerning our order for 25 cars.

Q. Did you send that letter to Ashenfelter?

A. Yes, sir.

Mr. MOISE.—I now offer it in evidence.

Mr. GRAHAM.—I object to the receipt of that letter in [71] evidence on the ground that it is a self-serving declaration, that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and it is inadmissible.

Also for the further reason that the transactions between Ashenfelter and Bruner have nothing to do with the issues made by this action.

Plaintiff's Exhibit No. 12, June 29, 1922, T. R. P. reads as follows:

Plaintiff's Exhibit No. 12.

“1-20-20.

“Mr. W. C. Ashenfelter,
Stock Exchange Bldg.,
Philadelphia, Penna.

“Dear Sir:

In regard to our order #11385 for 25 cars of fir accepted by you for the O. R. Menefee Company, Portland, Oregon, which we believe is binding and which we do not see how either you or the Menefee Company can get out of furnishing, would advise that we will have to hold this order as binding.

My customers are now calling for the material which I have sold to them. I have known you for many years and you have always stuck by your bargains. You told me you were representing a reliable concern, in fact, O. R. Menefee Company wrote us we should take up all matters regarding prices with you, which we have done. Our customers want to know when they may expect invoices and we must give them an answer.

Furthermore, we have never declined to receive any material on this order which you say you had cut and ready for cars, but we did ask you to furnish us with a list of the specifications which you

(Deposition of Owen M. Bruner.)

have not done. You no doubt will recall that you told us Menefee had some of the material cut on this order and you had already ordered in cars.

I do not see how the Menefee Company can turn you down. I know we cannot stand for it, and furthermore, after we got together and accepted the order, you said to us, 'Well, Bruner, you made [72] a good buy.' You showed me your letters and telegrams accepting this order from your Company, the O. R. Menefee Company. I am sure that after they understand this matter right, they will know that they will have to fill this contract.

We are returning to you the original orders and the shipping instructions for the cars consigned to Hammonton and Attica. Let us know when you can commence and complete shipment. We have told our customers that your concern (Menefee) is good for all their contracts and they will get the lumber. We told them we were dealing with only good people and this is the only way we considered the purchase at the time, because their former shipments to us were always very satisfactory. Counting on a favorable reply that Menefee Company will ship the material, we are

Yours very truly,"

Mr. MOISE.—I call for the original letter from Bruner to Ashenfelter dated 1-31-1920.

(Original letter produced.)

(By Mr. MOISE.)

Q. I will ask you if you sent that letter to Mr. Ashenfelter?

(Deposition of Owen M. Bruner.)

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant. A. Yes, sir.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—It is objected to on the same ground.

The letter is marked, Plaintiff's Exhibit No. 13, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 13.

“1-31-20

“W. C. Ashenfelter,
Builders' Exchange,
Philadelphia, Pa.

“Dear Sir:

We have a request under date of the 26th inst., [73] from the O. R. Menefee Company for balance of money due on three carloads of lumber. We are ready to settle for these 3 cars which they mention with the exception of one or possibly two cars on which there is an over-charge in freight rates for which we have not yet received our money, but what I particularly desire to state in this letter is—whether or not we shall hold this money and apply it against any extra prices we may have to pay on account of Menefee declining to ship our order for the 25 cars of lumber. I do not know that we can rightly withhold this money without due process of law but we dislike very much to consider any such action. What we want them to do is change face and say they will fill their accepted order for us.

“Yours very truly,

“OWEN M. BRUNER COMPANY.

(Deposition of Owen M. Bruner.)

(In pencil)

“OWEN M. BRUNER.”

Referred to O. R. M. Co.

W. C. A.

OMB—D 2-1-20

Mr. MOISE.—I call for the original letter from Bruner- to Allen-Murphy Lumber Company, successors to O. R. Menefee Company, dated September 3, 1920.

(Original letter produced.)

(By Mr. MOISE.)

Q. I will ask you if you sent that letter to the Allen-Murphy Lumber Company, successors to O. R. Menefee Company? A. I did.

Mr. MOISE.—I offer it in evidence.

Mr. GRAHAM.—Same objection.

The letter is marked Plaintiff's Exhibit No. 14, June 29, 1922, T. R. P., reading as follows:

Plaintiff's Exhibit No. 14.

“Order #11385

“September 3d, 1920.

“Allen-Murphy Lumber Company,

Successors to O. R. Menefee Company,

Portland, Oregon. [74]

“Gentlemen:

Replying to yours of the 27th ultimo in which you say you have a debit against us of \$2834.20.

(Deposition of Owen M. Bruner.)

While we have a counter-charge against you for a much larger amount for your nonfulfillment of our order for—

25 cars:

averaging 27,000' to a car

Totaling 675,000 ft.

at \$16.35

or

\$11,036.25

and we are awaiting your advice relative to same.

“Yours very truly,

“OWEN M. BRUNER COMPANY.

“OWEN M. BRUNER.”

OMB—EA

(By Mr. MOISE.)

Q. Referring to Plaintiff's Exhibit No. 12, you undertook to make some comment on a statement in that letter. What was it?

Mr. GRAHAM.—That is, certainly, objected to for the reason that the letter speaks for itself. The witness cannot add to, vary, contradict or modify its plain terms and provisions. It is also objected to on the further ground that it is irrelevant, incompetent and immaterial and not within any of the issues made by the pleadings in this action.

A. Mr. Ashenfelter called in our office after the acceptance of our order by him. I mean after his sale to us and our purchase of these 25 cars, and said he had some lumber to apply on the order. I asked him for the list, and I never received that list. What I want to know is, what

(Deposition of Owen M. Bruner.)

became of the cars which Menefee had cut on our purchase?

Mr. GRAHAM.—I move to strike out the answer of the witness on the ground that it is all incompetent, immaterial and irrelevant, and assumes facts not proved. We are not bound by any declarations made by Ashenfelter. [75]

(By Mr. MOISE.)

Q. Did Ashenfelter say the Menefee Company had cars already to be delivered, or had cut cars of lumber which were ready for delivery, on this order?

Mr. GRAHAM.—That is objected to on the ground that it is leading, and also on the ground that it is incompetent, irrelevant and immaterial, and not within the issues made by the pleadings.

A. Mr. Ashenfelter said he had some cars to apply on this order. I asked him for a list of those cars. I never received the list, and I never received notice of shipment, or anything about it.

Q. Cars of lumber cut by whom?

A. By Menefee on this purchase.

Q. I think you testified that you have been in the lumber business since about 1894?

A. Yes, sir.

Q. Have you bought and sold Douglas fir rough lumber before? A. Yes, sir.

Q. Is it in the line of your business to keep yourself posted as to the market values of lumber from time to time? A. Yes, sir.

Q. Do you do so? A. Yes, sir.

(Deposition of Owen M. Bruner.)

Q. How many years have you dealt in lumber, including Douglas Fir, shipped from the State of Oregon? A. When was the Seattle Exposition?

(By Mr. GRAHAM.)

Q. 1909.

A. I think 1909 was the first purchase we made.
(By Mr. MOISE.)

Q. Did you have any dealings in November and December 1919 in Douglas Fir including inquiries from persons who bought and sold that kind of lumber at that time? A. Yes, sir.

Q. As a result of your knowledge and experience in the lumber business, are you able to state the average market price of Douglas Fir lumber of the kind mentioned in the order which has been offered [76] in evidence in this case?

A. Yes, sir.

Q. What, in your opinion, was the market value of Douglas Fir lumber, rough, per 1000 feet, such as is specified in the order dated December 25, which has been offered in this case, and on December 19, 1919?

Mr. GRAHAM.—That is objected to on the ground that no sufficient foundation has been laid for the reception of the testimony sought to be elicited. Also on the further ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. \$64.35 per thousand feet delivered on the 78 rate of freight, which is the Philadelphia rate of freight, and \$64.85 per thousand feet delivered on

(Deposition of Owen M. Bruner.)

the 80 cent rate of freight, or the New York rate of freight.

Q. What is the average number of feet in a carload of Douglas Fir lumber shipped from the State of Oregon to points in or near Philadelphia and New York on the 78 rate to Philadelphia and on the 80 cent rate to New York?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant. Also on the ground that no sufficient foundation has been laid to show that the witness is competent to answer the question. A. 25,000 feet.

(By Mr. MOISE.)

Q. 25,000 feet in one carload?

A. In one carload.

Q. And for 25 carloads? A. 625,000 feet.

Q. What is the difference between the contract price in order dated November 25, 1919, and the market price on December 19, 1919, on 25 carloads?

Mr. GRAHAM.—That is objected to for the reason that it calls for a conclusion of the witness.

A. \$16.35 per thousand feet, making a total of \$10,218.75, which was [77] the difference in the market price at the time of the breach of the contract.

(By Mr. MOISE.)

Q. Did the Menefee Company, or anyone on its behalf, ever supply to you or offer to supply to you any of the 25 carloads of lumber which were

(Deposition of Owen M. Bruner.)

specified in the order which has been offered in evidence?

Mr. GRAHAM.—That is objected to on the ground that it assumes a fact not proven. Also on the further ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings. A. No, sir.

(By Mr. MOISE.)

Q. Have you made demand on the Menefee Company for the damages which you suffered by reason of the failure to receive such lumber?

A. We have.

Q. Have they paid same or any part thereof?

A. They have not.

Cross-examined.

(By Mr. GRAHAM.)

Q. You testified that you had some prior transactions with the Menefee Lumber Company, the defendant in this action. Is that a fact?

A. Yes, sir.

Q. By whom had those prior transactions been conducted? A. By Mr. Ashenfelter.

Q. Is it not a fact that in every instance the order had been sent to the Menefee Company for approval before being filled? A. No, sir.

Q. Would you say that it had not?

A. I am not prepared to answer that question without my other papers here. [78]

Q. In connection with this order which you

(Deposition of Owen M. Bruner.)

have testified about, all of your dealings were with Mr. Ashenfelter? A. Yes, sir.

Q. Is it not a fact that you made no claim from either Ashenfelter or the Menefee Company, the defendant in this action, until many months after the date of the alleged order? A. No, sir.

Q. Is it not a fact that the Menefee Lumber Company wrote you repeatedly for a balance owing on account of a purchase made theretofore by you from them? A. That is correct.

Q. Is it not a fact that until they had so written you, you had never made any written claim to either Ashenfelter or to them on account of any damages claimed by reason of the failure to fill this alleged order? A. No, sir.

Q. Will you produce, then, any written evidence of claims made by you to the Menefee Lumber Company prior to the date of September 3, 1920, the letter which is in evidence as Plaintiff's Exhibit No. 14?

A. We made our complaints to Ashenfelter and the letters have been offered in evidence. I think one of them was dated December 20, 1919, and the other January 20, 1920. Then there is another letter here, where they appeal for money, and I asked Ashenfelter what about paying that small balance of \$500, or thereabouts, for which they should have a credit, that I did not want to hold that money back unless I was within my legal rights.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Give us the date of that letter. What letter is it you are referring to?

A. January 31, 1920. There are three letters covering that question.

(By Mr. GRAHAM.)

Q. Then, if I understand you correctly, Plaintiff's Exhibits Nos. 12, 13 and 14 are the letters you wrote Mr. W. C. Ashenfelter and [79] the Allen-Murphy Lumber Company, successors to the Menefee Company, with reference to the matter of the claim you are now asserting? A. Correct.

Q. Prior to September 3, 1920, had you ever directly written to the defendant concerning any claim for damages by reason of the alleged failure to fill this alleged order?

A. I have no recollection of it.

Q. Is it not a fact that prior to the September 3, 1920, the defendant had sent you at least a dozen letters concerning a balance due on a shipment made in October or November 1919, or thereabouts, which letters had been unanswered until your letter of September 3, 1920, which is in evidence as Plaintiff's Exhibit No. 14?

A. That is probably correct.

Q. Isn't that correct?

A. Without the letters at hand, I will say yes.

Q. You recall that you received practically every month statements? A. Yes.

Q. And letters asking for your remittance?

A. I do not know about letters, but statements.

(Deposition of Owen M. Bruner.)

There were some letters, but I do not know that there were a dozen.

Mr. GRAHAM.—I ask that these seven letters be marked for identification as defendant's exhibits.

(Letters marked, Defendant's Exhibits for identification Nos. 1 to 7 inclusive.)

(By Mr. GRAHAM.)

Q. I hand you defendant Exhibits Nos. 1 to 7, inclusive, for identification, and ask you to produce the originals thereof if you have them.

Mr. MOISE—I think we have the originals.

(Originals produced.) [80]

(By Mr. GRAHAM.)

Q. Counsel has now produced the original letters, of which Defendant's Exhibits 1 to 7 inclusive for identification are copies, and I now ask you whether or not you received those original letters which I now hand you? A. Yes, sir.

Mr. GRAHAM.—I ask that these letters be received in evidence as Defendant's Exhibits.

Mr. MOISE.—The letters are objected to as incompetent and irrelevant.

It is stipulated between counsel for the respective parties that statements accompanied the letters which have just been offered in evidence.

The letters which have just been offered in evidence are marked respectively Defendant's Exhibits Nos. 15, 16, 17, 18, 19, 20 and 21, and reads as follows:

Defendant's Exhibit No. 15.

"February 27, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Mar. 3, 1920

Answered ——

Int. —— File ——

1 2 3 4

"Owen M. Bruner Lumber Co.,

Philadelphia, Pa.

"Gentlemen:

On examination of your account we find that freight bills are standing out with you on the following cars:

30378

149154

870002

These cars were shipped to you way back in September and October and we would ask that you hurry them along to us as fast as possible as they are getting old and we would like to make final settlement with our mills on these cars.

"Yours truly,

"O. R. MENEFEE COMPANY,

"AL-JB.

"By A. L. Lendholm." [81]

Defendant's Exhibit No. 16.

"March 19th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Mar. 24, 1920

Answered ———

Int. ——— File ———

1 2 3 4

"Owen M. Bruner Co.,
Colonial Trust Bldg.,
Philadelphia, Pa.

"Dear Sirs:

We shall be pleased if you will send us final settlement and freight bills for the three cars shipped in September and October 1919.

"Yours truly,

"O. R. MENEFEE COMPANY.

AL-E

"By A. L. Lendholm."

Defendant's Exhibit No. 17.

"April 21st, 1920.

"Owen M. Bruner Lumber Co.,
Colonial Trust Bldg.,
Philadelphia, Pa.

"Gentlemen:

Will you kindly send us freight bills covering

cars shipped you in September and October 1919,
at your earliest convenience.

“Yours truly,

“O. R. MENELEE COMPANY.

AL-F

“By A. L. Lendholm.”

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Apr. 26, 1920

Answered —

Int. — File —

1 2 3 4

Defendant's Exhibit No. 18.

“May 19th, 1920.

“Owen M. Bruner Company,

Philadelphia, Pa.

“Gentlemen: [82]

In checking over your account we find that
there are the following freight bills due on cars
as follows:

Car September 15th	30378
--------------------	-------

Car September 26th	149154
--------------------	--------

Car October 18th	870002
------------------	--------

We shall be pleased if you will mail this to us
as soon as possible.

“Yours truly,

“O. R. MENELEE COMPANY.

AL-F

“By A. L. Lendholm.”

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd May 24, 1920

Answered —

Int. — File —

1 2 3 4

Defendant's Exhibit No. 19.

"June 17th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Jun. 22, 1920

Answered —

Int. — File —

1 2 3 4

"Owen M. Bruner Company,
Philadelphia, Pa.

"Gentlemen:

We have repeatedly requested freight bills on cars Nos. 30378-149154 and 870002, shipped in September and October, 1919, with no result. Surely you must hold these freight bills by this time, and a small effort on your part in sending these would certainly help us out a great deal.

"Yours truly,

"ALLEN-MURPHY LUMBER COMPANY.

LEF-F

"By L. E. F."

Defendant's Exhibit No. 20.

“July 29th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Aug. 4, 1920

Answered ———

Int. ——— File ———

1 2 3 4 [83]

“Owen M. Bruner Company,
Philadelphia, Pa.

“Gentlemen:

Quotations subject to change without notice. Agreements are contingent upon strikes, accidents and other delays unavoidable or beyond our control.

On reading over our last letter to you we cannot see any reason why we have not been favored with a letter at least upon such an urgent appeal to you explaining why we have not received freight bills on some cars shipped nearly a year ago.

Even though you do not hold these freight bills we are at a loss what to know since you do not even take the time to write us relatively. We ask you now for your letter. The cars in question are 30378, 149154 and 870002 shipped in September and October 1919.

May we expect the courtesy of a reply.

“Yours very truly,

“ALLEN-MURPHY LUMBER CO.

“LEF-F

“By L. E.”

(Deposition of Owen M. Bruner.)

Defendant's Exhibit No. 21.

“Aug. 27th, 1920.

(Stamp)

Owen M. Bruner Co., Phila.

Rec'd Sep. 1, 1920

Answered —

Int. — Filed —

1 2 3 4

“Owen M. Bruner Company,
Philadelphia, Pa.

“Gentlemen:

Your account has stood open with us for several months with a debit of \$2834.20. We have written repeatedly for money, but with not even the result of an answer, let alone cash. We would desire to know immediately, in order to let us know where we stand, what you intend to do regarding this in order that we may take proper action accordingly.

We trust that we may hear from you immediately.

“Yours truly,

“ALLEN-MURPHY LUMBER CO.

LEF-F

“By L. E.” [84]

(By Mr. GRAHAM.)

Q. I also ask you if, in addition to those letters which have been offered in evidence, drafts were not drawn on you and the matter finally placed in the hands of the Pacific Coast Shippers' Association who communicated with you repeatedly on this balance owing on a former purchase?

(Deposition of Owen M. Bruner.)

A. Yes, sir.

Q. How long have you been acquainted with Mr. W. C. Ashenfelter?

A. Fifteen or twenty years, I guess. Probably more. I don't know how long.

Q. Do you know his business in the city?

A. Yes, some of it.

Q. You have bought lumber from him many times?

A. I don't know how much I bought from Mr. Ashenfelter.

Q. Or through Ashenfelter?

A. Through Ashenfelter.

Q. Have you?

A. Sure. I bought this from him.

Q. But other orders?

A. No, I do not recall any.

Q. The relations between you and Mr. Ashenfelter are quite friendly, are they not?

A. Quite so.

Q. And it is a fact, is it not, that prior to the commencement of this action Mr. Ashenfelter furnished you a complete file of letters passing between him and the Menefee Company and you have had them at all times for your use?

A. You mean in our action?

Q. Yes. Prior to the time that this action was commenced in the Federal Court?

A. This file does not seem to be complete.

Q. He furnished you such letters as he had that

(Deposition of Owen M. Bruner.)

had passed between him and the Menefee Lumber Company. Isn't that the fact?

A. The letters I have here I got from Mr. Ashenfelter.

Q. And at the time you prepared a brief, prior to the time that this action was instituted in the United States District Court for Oregon, is it not a fact that Mr. Ashenfelter assisted you in the preparation of that brief? A. No, sir. [85]

Q. Isn't it a fact that Mr. Ashenfelter read the brief, and swore that it was a true and correct statement of facts?

A. That part, I believe, is correct. That is a matter of record, is it?

Q. When did Mr. Ashenfelter communicate to you the wire of December 19 which is in evidence as Plaintiff's Exhibit No. 9?

A. Oh, he called at my office and left it there and I found it next day when I returned to the office.

Q. I understood you to testify that a letter followed that wire. Did he also show you that letter that is, the letter under the same date as the wire, which is in evidence as Plaintiff's Exhibit No. 10?

A. He received this letter at his place on December 30. It bears our stamp mark on it.

Q. Then he communicated that letter to you also? A. Yes, sir.

Q. Up to that time had you sustained any loss on account of the failure to fill this alleged order?

A. Sure.

(Deposition of Owen M. Bruner.)

Q. Then what do you mean by saying in your letter to Mr. Ashenfelter, under date of January 31, 1920, that you are in doubt "whether or not we shall hold this money," that is, referring to the balance on the prior purchase, "and apply it against any extra price we may have to pay on account of Menefee declining to ship our order for the 25 cars of lumber."

A. Just what it states.

Q. Had you been compelled at that time to make any purchases at extra prices by reason of the failure of the Menefee Company to fulfill this alleged order?

A. That letter shows that there was a difference in the market price at the breach of the contract.

Q. But that does not quite answer my question. At the time that letter was written, had you made any purchases at prices greater than the prices specified in this order? A. Of the lumber?

Q. Yes.

A. Not on this order. I bought other lumber outside. Not on this order. I did not buy any against this order. [86]

Q. Then, you had not placed any orders for other lumber covered by this alleged order at prices greater than the price specified in the order?

A. No, I tried to replace this order and the prices ran 10, 15 and 20 per thousand more. In fact, I could not get definite quotations from any one on this schedule.

Mr. GRAHAM.—I ask that letter dated Decem-

(Deposition of Owen M. Bruner.)

ber 2, 1919, from the Menefee Company to Ashenfelter be marked for identification.

(Letter marked Defendant's Exhibit No. 8 for identification, T. R. P.)

Mr. GRAHAM.—I ask counsel to produce original of letter dated December 2, 1919, from the Menefee Company to Ashenfelter, if they have it.

(Original letter produced.)

Mr. GRAHAM.—Counsel has now produced the original of letter dated December 2, 1919, from the Menefee Company to Ashenfelter, a copy of which was marked for identification Defendant's Exhibit No. 8.

(The letter is now marked Defendant's Exhibit No. 22, June 29, 1922, T. R. P.)

(By Mr. GRAHAM.)

Q. I now hand you Defendant's Exhibit No. 22, and ask you if you have ever seen that letter before? A. Yes, sir.

Q. When did you first see it?

A. I do not recall.

Q. Would you say that it was not immediately upon its receipt in due course of mail from Portland, Oregon, to Philadelphia?

A. I don't know when I received that letter but when they flunked on their order I called Ashenfelter for his entire file.

Q. Referring now to Defendant's Exhibit No. 22, I will ask you if [87] it is not a fact that immediately upon its receipt in Philadelphia Mr.

(Deposition of Owen M. Bruner.)

Ashenfelter advised you of the contents of this letter?

A. The first I knew about this letter was when this telegram came in. The first I knew of it was when that letter came in of December 19. I did not know anything about it before.

Q. Then, do you mean to say that you had no information prior to December 19, the date this wire was sent, that the Menefee Company would not fulfill this order? Is that the fact?

A. I do not recall.

Q. Would you say that the contents of that letter were not communicated to you by Mr. Ashenfelter, the letter of December 2, 1919?

A. I do not recall now.

Q. Would you say that the contents were not communicated to you by Mr. Ashenfelter prior to December 19?

A. I have no recollection.

Q. Is it not a fact that supplemental orders, or suborders, as you called them, about which you have testified, were forwarded by you after the receipt of this letter of December 2, 1919, marked Defendant's Exhibit No. 22? A. Yes that is correct.

Q. And after you knew that the Menefee Company would not fulfill the order for specified widths and lengths? The question I had asked you was if it was not a fact that these suborders, which you have offered in evidence, were sent after the receipt of this letter of December 2, 1919, which is marked Defendant's Exhibit No. 22, and I followed that

(Deposition of Owen M. Bruner.)

question up with the question of whether or not at the time the suborders were sent in you knew that the Menefee Company were at least objecting to the fulfillment of this original alleged order on the ground that it was for specified widths and lengths rather than random widths and lengths? With that explanation on my part, will you answer the question?

A. What do you mean by "random widths and lengths"?

Q. With that explanation on my part, will you now tell me whether [88] or not the contents of Defendant's Exhibit No. 22 were communicated to you prior to the wire of December 19 which you hold in your hand, which is offered in evidence as Plaintiff's Exhibit No. 9?

A. I am not sure how to answer that question unless I refresh my memory on that.

Q. You at least secured this letter, which has been marked Defendant's Exhibit No. 22, from Mr. Ashenfelter after this controversy arose?

A. I have no recollection of that at all.

Q. You have a recollection of the wire which has been offered in evidence as Plaintiff's Exhibit No. 9? A. Yes.

Q. And you have a recollection of the letter which was written on the same date on which the wire was sent, which is in evidence as Plaintiff's Exhibit No. 10?

A. Yes. I answered this letter, didn't I?

Q. You have a recollection of that wire?

(Deposition of Owen M. Bruner.)

A. I have a recollection of the wire and I have a recollection of this.

Q. You do not appear to have a recollection of the letter which has been marked Defendant's Exhibit No. 22?

A. Not sufficiently to say yes to it.

Q. Not sufficiently to say whether its contents were or were not communicated to you?

A. No, sir.

Mr. GRAHAM.—I now offer in evidence Defendant's Exhibit No. 22. The witness has testified that there was a letter he has had in his possession, which he secured from Ashenfelter, which was written by the Menefee Company to Ashenfelter, and I think that the identification of it is, therefore, sufficient, and it becomes admissible evidence.

Mr. MOISE.—It is objected to on the ground that it is incompetent, irrelevant and immaterial to the issues in this case. [89]

Defendant's Exhibit No. 22 reads as follows:

Defendant's Exhibit No. 22.

“December 2, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Bldg.
Philadelphia, Pa.

“Dear sir:

We are this morning in receipt of Bruner's order #11385, which is a blanket order with no shipping instructions.

This order is not in accordance with your letter of November 14th, on which we quoted. It was

(Deposition of Owen M. Bruner.)

our understanding from your letter that this order would be in accordance with our acknowledgment of the 24th, and we have four cars ordered for Philadelphia and will load accordingly.

The only way we can handle this order is random widths and lengths. We cannot ship specified widths and lengths in each car. We had a mill which was particularly anxious to saw and ship this stuff random widths and lengths for the same class of stock shipped in specified lengths we are receiving \$9.00 per thousand more. If we can get the cars we will have four or five cars on the road within the next few days. If this is not satisfactory, please advise immediately.

“Yours truly,

“O. R. MENEFEE COMPANY

“By_____.”

(In pencil)

Ans'd,

12-10-19

OFT-JB

Mr. GRAHAM.—In view of that objection, we will ask the witness Ashenfelter further questions concerning that letter.

(By Mr. GRAHAM.)

Q. You testified that you were familiar with the market price of the quality of lumber covered by this alleged order on or about December 19, 1919?

A. Yes, sir.

Q. Were you familiar with its market price on or about November 25, 1919? A. Yes, sir. [90]

Q. What was the difference between the market

(Deposition of Owen M. Bruner.)

price of this lumber on November 25, 1919 and December 19, 1919, or on or about December 19, 1919?

A. \$16.35 per thousand feet.

Q. Do you mean to say, then, that in less than 30 days, approximately, the market value of that class and character of lumber increased \$16.35 per thousand feet in Philadelphia, Pennsylvania?

A. Yes.

Q. And that is your testimony? A. Yes, sir.

Q. Then, you want to be understood as testifying that you bought that lumber from Mr. Ashenfelter at the prevailing market price on November 25, 1919? A. Correct.

Q. The orders which are in evidence I think speak for themselves, but they were all sent with pieces of specified widths and lengths, weren't they?

A. Yes. Specified; no, sir. What do you mean by "specified"?

Q. I call your attention to Plaintiff's Exhibits No. 7 and 8 and I ask you if it is not a fact that the suborders, as you have termed them, called for specified widths and lengths to be supplied by the Menefee Company?

A. This is a miscellaneous order.

Q. Will you answer my question yes or no, then make any explanation you please.

A. I will say "Yes" and "No." That is capable of two answers.

Q. All right. Let us hear your explanation.

A. It is a miscellaneous yard order. It did not call for exact number of pieces on the order.

(Deposition of Owen M. Bruner.)

Q. Do you mean to testify that when the order, referring to Plaintiff's Exhibit No. 7, specifies 50 pieces, 24 feet long, that that does not specify a specified width and a specified length?

A. It states the length and it states the width.

Q. You asked me a moment back to explain to you the difference between specified widths and lengths and random widths and lengths.

A. Yes, sir. [91]

Q. From your experience of many years of buying and selling lumber, don't you recognize a difference between specified widths and lengths and random widths and lengths?

A. That is a random order.

Q. Answer the question please. Don't you recognize a difference, from your experience in buying and selling lumber over a period of years, between an order for specified widths and lengths and an order for random widths and lengths?

A. Yes, if you mean by "specified" the exact number of pieces, ordered for a barn or for a factory or for a railroad construction where it has got to be exact and specific. This is not that kind of an order.

Q. But that does not answer my question. I was not asking you concerning a particular order. I was asking you generally, if you do not, from your experience of many years in buying and selling lumber, recognize a difference and a real distinction between an order for specified widths and lengths and an order for random widths and lengths?

(Deposition of Owen M. Bruner.)

A. I do. I will take that.

Q. Is it not a fact, too, that the market price for lumber shipped to specified widths and lengths is greater than the market price for lumber shipped to random widths and lengths?

A. On a single carload purchase, yes, maybe, but on a 25 carload purchase, wherein it runs from two inch plank, which we asked for, and which was confirmed by Ashenfelter, up to 12x12's, and including large sizes, we are within the scope of the order in furnishing you miscellaneous sizes, and that order may vary from 10 to 15 per cent, and I will leave it to you as a lumberman, or the West Coast Association. Those people attempted to bring a suit against us. Then you people jumped out from under the arbitration affair. Any one of them will call that a random yard [92] order and not for a specified contract. It is within the scope of the order.

Q. Continue your explanation. I am delighted to hear it, because I will say this to you, in all confidence, in line with the testimony of experienced lumbermen on the coast, that this order would never be considered an order for anything other than specified widths and lengths. Every lumberman on the coast will so testify.

Q. They wanted two-inch plank, and the original quotation or inquiry was for 3x6 and larger, and they asked of us two-inch plank. Didn't they?

Q. I am not on the witness-stand.

A. I say they did.

(Deposition of Owen M. Bruner.)

Q. You speak about original quotations. Did you see the original letter of November 14, 1919 which Mr. Ashenfelter sent to the Menefee Lumber Company?

A. I did not see that until sometime after the correspondence. I am trying to think when I did see that.

Q. Didn't that letter call for random widths and lengths?

A. No, sir, not random at all. I believe the first time "random" was mentioned was in this letter of December 2, I guess it was December 2, after the date of the acceptance of the order by their representative, by their Eastern Manager.

Mr. GRAHAM.—I will ask counsel to produce letter dated November 14, 1919 from Ashenfelter to defendant, or a copy of that letter. I have not the original with me.

(Copy of letter produced.)

Mr. GRAHAM.—I will say on record that we have made a very careful search and at the proper time we will prove it, to find the original of this letter.

(By Mr. GRAHAM.)

Q. I hand you copy of letter which is dated November 14, 1919, [93] which counsel for plaintiff has just handed me, and ask you if you have ever seen that letter before?

A. Yes, I have seen this before.

Q. Can you say just when you saw it before?

A. Sometime after they broke the contract.

(Deposition of Owen M. Bruner.)

Q. Did Mr. Ashenfelter show you that letter before this alleged order was placed with him?

A. You mean on November 25?

Q. Yes. A. I think not.

Q. Would you say he did not?

A. I would say he did not.

Q. And you identify this letter which you hold in your hand as one which Mr. Ashenfelter delivered to you, along with the other correspondence, passing between him and the Menefee Lumber Company?

A. Yes.

Q. So that we may be clear on this matter, will you say whether you saw this letter, which has been marked Defendant's Exhibit No. 23 prior to November 25, 1919, or after November 25, 1919?

A. I saw this afterwards.

Q. All right. That answers the question.

Q. You have got this random business on your mind.

Q. Wait a minute. That letter speaks for itself. They will ask you about that on redirect examination. Referring again to this balance, which defendant has set up in his answer, in the sum of \$551.32, do you admit that indebtedness to the defendant?

A. That is correct. They are entitled to a credit.

Defendant's Exhibit No. 23 is offered in evidence by counsel for defendant, and reads as follows:

(Deposition of Owen M. Bruner.)

Defendant's Exhibit No. 23.

“Nov. 14-19

(Million feet inquiry)

O. R. M. Co.,

Our good friend Bruner here says if you want some [94] business in #1 com Fir rough, and will make a price on such stuff as the following he will immedy place his order for same. You can ship 3 to 4 cars or more at a time of the following, 3x6" 8" 10" & 12" x 36 ft & under, and 4x6, 8" 10" & 12", 6x8, 8x8, 10x10 and 12x12 all lengths, up to 40 ft and under, #1 com rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say 3 to 5 or 10 cars at a time, if you will make him a price of \$46.00 to \$47.00 per M ft. If so he will place an order for a million feet to be made up of the various sizes above stated & in few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time. Will you kindly give this your best consideration, and please advise me promptly and oblige.

“Yours,

WCA-A

“W. C. ASHENFELTER.”

Redirect Examination.

(By Mr. MOISE.)

Q. Will you explain the difference between random widths and lengths and specified widths and lengths with respect to this order in this case?

A. I consider this order both random and mis-

(Deposition of Owen M. Bruner.)

cellaneous with limitations. This order was an order which was inclusive. That is, from my standpoint, it included anything that a mill could furnish. It was a very elastic order, and in that sense it is random, and the letter of Ashenfelter of November 14, 1919 says "3x6, 3x8, 3x10, 3x12x36 and under, and 4x6, 4x8, 4x10 and 4x12, and 6x8 and 8x8 and 10x10 and 12x12, all lengths, up to 40 ft and under, #1 common rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say 3 to 5 or 10 cars at a time, if you will make him a price of \$46 to \$47 per thousand feet. If so, he will place an order for a million feet to be made up of the various [95] sizes above stated and in few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time? Will you kindly give this your best consideration, and please advise me promptly and oblige." That is signed by Ashenfelter.

Our business is wholesalers. We are prepared to take anything the mill can furnish, and we have a good string of customers. We can take anything that a man can ship. This order was for 25 cars and was accepted by the eastern manager of Menefee, who was Ashenfelter. It called for 25 cars, and he accepted this order, signed for it, and it called for two inch stock, or 2x4, up to 12x12, and 12 x40 feet long. That is random enough and specific enough for any one. These two orders, one of Hamonton and one for Attica, came within the scope

(Deposition of Owen M. Bruner.)

of that purchase. These two orders were yard orders, not calling for exact quantities, because all manufacturers and all dealers know that a yard order is to fill in stock, to fill up the gaps, and can vary 10 or 15 per cent, and no one objects to that. It is a custom of the trade. There is not a size in either one of these orders that does not come inside of the 25 carload order, from 2x4 to 12x12. There is not a size in either the Hammonton order of December 13 or the Attica order of December 29, Plaintiff's Exhibits Nos. 7 and 8, which do not conform and come within the radius or scope of the original 25 carload order. Every bill we received on former shipments, on a similar order to this from the Menefee Company, included these sizes. We had a former order which called for I do not know how many pieces or carloads of similar sizes, and they shipped those within that scope, and they varied in those sizes, and that was a random order the same as this, even though it specified the number of pieces, because the order called for so much, and it is a custom of the trade, well established, that cars are put in transit, [96] and are sold. The former cars on the former purchase were in transit, and we got along so nicely on those orders, that this order was an outgrowth of that.

Mr. GRAHAM.—I move to strike out the testimony of the witness with respect to a custom of the trade. No such custom is pleaded. Any such testimony is purely inadmissible.

(Deposition of Owen M. Bruner.)

The WITNESS.—You were saying awhile ago that this order was worth more money than what you would call a specified order. I want to tell you that this entire 25 carload order was worth more than \$9 or \$10, which they admit it was worth. I believe that the entire order, at the time of the breach of this contract,—the difference in the market price,—at the place called for of delivery, must have been about \$16.35 difference in market price. (By Mr. MOISE.)

Q. You testified as to the market price of the lumber on December 19, 1919 at the time of the breach. You originally bought this lumber at what price?

A. At \$48 Philadelphia delivered on the 78 cent rate of freight and \$48.50 delivered on the 80 cent rate of freight, which is the New York rate.

Q. You consider that you made a good buy, don't you? A. I do.

Q. Was it above or below the market price at that time?

A. That was the market price at that time between Ashenfelter and ourselves.

Q. What do you mean by that, the market price at that time between Ashenfelter and yourselves?

A. Well, other quotations were made at the same time by other people. I had similar quotations at the same time.

Q. What was the condition of the lumber market on November 25, when this order was placed?

Mr. GRAHAM.—That is objected to on the ground that it[97] is incompetent, immaterial and irrel-

(Deposition of Owen M. Bruner.)

evant, and not within any of the issues made in these pleadings.

(By Mr. MOISE.)

Q. Answer the question.

A. I think I paid the full market price at the time I bought the 25 cars. 25 cars is not a small purchase. It is a block order. It is a bulk order. I paid a good price. I could not tell whether the market was going to go down or up, but it was a good buy, I believe. I was anxious to do more business with these people.

Q. Counsel for defense has asked you why you did not pay the balance of the \$551 which you admitted to be due to the Menefee Company. What was your sole reason for not paying the balance?

A. Because they are indebted to us for a greater sum.

Q. You were asked on several occasions by counsel for the defendant when you first saw the correspondence which passed between Mr. W. C. Ashenfelter and the Menefee Company. I now ask you whether Mr. Ashenfelter showed you this correspondence prior to December 19, 1919? A. No, sir.

Q. What, if anything, occurred between Mr. Ashenfelter and yourself with respect to the increasing price of this lumber after you first gave him the order for it?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

Mr. MOISE.—I will withdraw that question.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. What did you understand was the original price per thousand at which you bought this lumber from Ashenfelter? A. \$48 and \$48.50.

Q. Wasn't there some mistake about the price?

A. There was a mistake about the price. We corrected the mistake. I sent down \$46 and \$46.50. He immediately called me and said I [98] had made the price \$2 less, and I corrected it. That was the correction made in accordance with our understanding, which was \$48 and \$48.50. He wrote me and he brought me to task in a letter there.

Recross-examination.

(By Mr. GRAHAM.)

Q. In your redirect examination you had occasion to testify at length concerning defendant's Exhibit No. 23, being a letter dated November 14, 1919 from Ashenfelter to the Menefee Company. In that letter I call your attention to the fact that it says: "Our good friend Bruner here says if you want some business in #1 common fir rough, and will make a price on such stuff, he will immediately place his order for same"?

I will ask you, therefore, if prior to November 14 Ashenfelter and you had discussed this order which was placed November 21 or November 25?

A. I think not.

Q. What, then, is meant by this expression or statement in Defendant's Exhibit No. 23, being a letter from Ashenfelter to Menefee, that:

(Deposition of Owen M. Bruner.)

“Our good friend Bruner here says if you want some business in #1 common fir rough, and will make a price on such stuff, he will immediately place his order for same”?

Isn't it a fact that you and he had discussed this matter, and that was the occasion of this letter of November 14 being written?

A. That part is correct. He came into my office and asked me for some business, because they had shipped some lumber, three cars, which they asked for freight bills on, which I did not have in hand. That is one reason they did not get their freight bills back in some of these statements. He wrote me several letters. You will find some of my answers. I did not have the [99] freight bills because of some mistakes in the freight bills. He came in and solicited this business. Good salesman like he is, he boosted the price up on me and told me what a good buy it would be, and I came to his solicitation. I told him, “All right. We will get together.” This was the result.

Q. That was all prior to November 14?

A. It may have been. It might have been a day ahead. It may have been the same day.

(By agreement between counsel for the respective parties, the signature of the witness is waived.)

Deposition of W. C. Ashenfelter, for Plaintiff.

W. C. ASHENFELTER, having been duly sworn, was examined and testified as follows:

(By Mr. MOISE.)

Q. What is your full name?

(Deposition of W. C. Ashenfelter.)

A. W. C. Ashenfelter.

Q. What is your business?

A. Sales Agent. Manufacturers' representative.

Q. Have you had any dealings with the plaintiff and defendant corporation in this case?

A. Yes, sir.

Q. Do you recall meeting an officer of O. R. Menefee Company in the early spring of 1918?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, irrelevant and immaterial. A. Yes.

(By Mr. MOISE.)

Q. What was his name?

A. O. R. Menefee and Judge Ellis.

Q. What position did O. R. Menefee hold in the Menefee Company?

A. He was president of the company.

Q. Were you employed by O. R. Menefee?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant, and not within the issues made in the pleadings. [100]

A. Yes, sir. I was Eastern Representative.

(By Mr. MOISE.)

Q. Eastern Representative?

A. Yes, sir, or Eastern Manager.

Q. Of what company?

A. O. R. Menefee Company.

Q. How long did you occupy that position?

Mr. GRAHAM.—The same objection.

A. About two years, or more.

(Deposition of W. C. Ashenfelter.)

Q. What, if any, conversation did you have with O. R. Menefee, President of the O. R. Menefee Company, with respect to printing cards and stationery with your name on them?

Mr. GRAHAM.—The same objection.

(By Mr. MOISE.)

Q. What did he say and what did you do?

A. Mr. Menefee asked me to represent him here in the East as his Sales Agent and as Manager and told me to get cards and envelopes printed and to send the bill to him, which I did, and which he remitted to the printers here.

Q. I show you Plaintiff's Exhibit No. 3. Is that one of the cards you had printed at the request of Mr. Menefee?

Mr. GRAHAM.—The same objection.

A. Yes, sir.

(By Mr. MOISE.)

Q. I show you two envelopes on which appear "W. C. Ashenfelter, Eastern Manager."

A. Yes, sir.

Q. Who had those envelopes printed?

Mr. GRAHAM.—The same objection.

A. I had them printed at Mr. Menefee's request.

(By Mr. MOISE.)

Q. And who paid for the printing?

Mr. GRAHAM.—The same objection.

A. Mr. Menefee. [101]

(By Mr. MOISE.)

Q. Did you send envelopes of this character to the O. R. Menefee Company?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

A. Always. Always did so, from the time they were printed.

Mr. MOISE.—I offer them in evidence.

Mr. GRAHAM.—They are objected to as incompetent, irrelevant and immaterial, and not within the issues made by the pleadings in this action.

(The two envelopes just offered in evidence are marked respectively Plaintiff's Exhibits Nos. 24 and 25.)

Plaintiff's Exhibit No. 24 reads as follows:

Plaintiff's Exhibit No. 24.

“Return in 5 Days to

W. C. Ashenfelter

Builders' Exchange, Philadelphia,

Eastern Manager,

O. R. Menefee Company.”

Plaintiff's Exhibit No. 25 reads as follows:

Plaintiff's Exhibit No. 25.

“Return in 5 Days to

W. C. Ashenfelter,

Builders' Exchange, Philadelphia,

Eastern Manager,

O. R. Menefee Company,

O. R. MENEFEES COMPANY,

1400 YEON BUILDING,

PORTLAND, OREGON.”

(By Mr. MOISE.)

Q. What were your duties which you performed for the Menefee Company?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and if it be an attempt to prove agency, it cannot be proved in this manner.

(By Mr. MOISE.) [102]

Q. What did you do?

A. Sold lumber for them and took orders and adjusted accounts, where necessary.

Q. How many transactions did you have for the Menefee Company?

Mr. GRAHAM.—The same objection.

A. Quite a lot.

(By Mr. MOISE.)

Q. Tell us the number and amount.

Mr. GRAHAM.—The same objection.

A. Well I cannot say offhand. Probably 50 orders, more or less.

(By Mr. MOISE.)

Q. Covering how many million feet of lumber?

Mr. GRAHAM.—The same objection.

A. Probably several million.

(By Mr. MOISE.)

Q. Over what states did you sell lumber for the Menefee Company?

Mr. GRAHAM.—The same objection.

A. I agreed with Mr. Menefee to have the territory from New York to Richmond, Virginia.

(By Mr. MOISE.)

Q. Did you get that territory?

Mr. GRAHAM.—The same objection.

(Deposition of W. C. Ashenfelter.)

A. Yes, sir.

(By Mr. MOISE.)

Q. Now tell about the manner in which you conducted this business. How did you go about it?

Mr. GRAHAM.—The same objection.

A. I took such orders as I could secure for him. I did not sell common lumber for anybody else, nor represent any other mill or connection on the Pacific Coast in common lumber but Menefee.

Now, you cannot say there is a fixed price for fir [103] material in this market for the reason that fir is not in universal use in this particular section, and while I sold a great many orders, there were times that I would write or wire Menefee for a lower price, or if I could not get the price that I tried to get, and had an offer on a lower price, I frequently would wire him to see if it would be acceptable to him.

Q. In this particular order which we are discussing in this case, did you take this matter up with O. R. Menefee before you sold the 25 cars to Bruner?

Mr. GRAHAM.—The same objection.

A. Yes, sir.

(By Mr. MOISE.)

Q. I show you copy of letter marked and offered in evidence as Defendant's Exhibit No. 23 and ask you if that is a copy of a letter which you sent to the Menefee Company on November 14, 1919?

A. Yes, sir.

(Deposition of W. C. Ashenfelter.)

Q. With respect to the order for 25 cars which has been offered in evidence in this case?

A. Yes, sir.

Q. Did you receive a reply to that letter?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

A. Yes, I received a reply to that letter.

(By Mr. MOISE.)

Q. I show you a telegram from the Menefee Company to Ashenfelter dated November 20, 1919, and ask you if that is the reply?

A. Yes, that is the reply.

Mr. MOISE.—I offer that telegram in evidence as Plaintiff's Exhibit.

(Same objection.) [104]

The telegram is marked Plaintiff's Exhibit No. 26, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 26.

“1919 Nov 20 P M 10 30

B486CH 33 NITE

Portland Org 20

W C Ashenfelter X 398

Builders' Exch Bldg Philadelphia Pa

Can handle twenty cars Bruner rough timbers forty-seven dollars net to us must know immediately if this offer accepted this is low price and you should be able to add your commission.

O R MENEFEЕ CO.

(In pencil) Ans'd 11-21-19 A”

(Deposition of W. C. Ashenfelter.)

Mr. MOISE.—I call for the original telegram from Ashenfelter to the Menefee Company dated November 21, 1919.

Mr. GRAHAM.—I do not appear to have the original wire in my files.

(Original not produced.)

Mr. MOISE.—I will offer in evidence copy of telegram addressed to O. R. Menefee Company, dated November 21, 1919, signed W. C. Ashenfelter.

(By Mr. MOISE.)

Q. And I will ask you if you sent that telegram to the Menefee Company?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. Yes, sir. That is right. I sent that.

Mr. MOISE.—I offer that telegram in evidence.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

The telegram is marked Plaintiff's Exhibit No. 27, [105] June 29, 1922, T. R. P., and reads as follows:

(Deposition of W. C. Ashenfelter.)

Plaintiff's Exhibit No. 27.

“Philada. Nov. 21st-19.

(Stamp) B W P K

Owen M. Bruner Co., Phila.

Rec'd Nov. 25, 1919

Answered —

Int. — File —

1 2 3 4

To O. R. Menefee Company. Street and No.
#1400 Yeon Bldg. Place Portland Ore.,

Answering your telegram twentieth that forty eight dollare Philada is best you can do for Bruner, but can only take twenty-five cars and for immediate acceptance. Bruner accepts, enter his order for twenty-five cars at forty eight dollars Philada rate specifications to follow.

W. C. ASHENFELTER

(In ink)

Confirmation

Copy to Bruner

W. C. A.

11-22-19”

(By Mr. MOISE.)

Q. I show you a letter dated November 24, 1919, signed by the O. R. Menefee Company addressed to you and ask you if you received that letter?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

A. Yes.

Mr. MOISE.—I offer that letter in evidence.

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

The letter is marked Plaintiff's Exhibit No. 28, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 28.

“November 2, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Building,
Philadelphia, Pa.

“Dear Sir:

We are in receipt of your wire of the 21st, instructing [106] us to enter Bruner order for twenty-five cars 3x6 to 3x12, 4x6 to 4x12 and 6x8, 8x8 and 10x10 and 12x12, 40 foot and under at \$48.00 delivered Philadelphia.

The mill has some of this stock on hand and is ordering the first car this morning. Please advise if Bruner will accept any stock larger than 12x12 also can he use any 2" stock.

“Yours truly,

“O. R. MENEFEE COMPANY

OFT-JB

“By _____.”

(In pencil)

Ans'd 12-4-19

(By Mr. MOISE.)

Q. Had you made sales of lumber for the Menefee Company to the Bruner Company before this transaction here in suit?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and

(Deposition of W. C. Ashenfelter.)

irrelevant, and not within the issues made by the pleadings.

A. Yes, sir.

(By Mr. MOISE.)

Q. Did you ever notify Bruner in any manner that any contracts for the sale of lumber which you might make for the Menefee Company had to first be ratified by the Company before agreement would be binding?

Mr. GRAHAM.—That is objected to for the same reasons, and I make the further objection that the question is leading, and that agency cannot be proved in the manner attempted.

A. No, sir.

(By Mr. MOISE.)

Q. The answer filed in this case the defendants state that you were nothing but a lumber broker. Was that the capacity in which the Menefee Company employed you?

Mr. GRAHAM.—I object to this question for the [107] same reason stated to the preceding question.

A. No, sir. I was his exclusive representative in this territory.

(By Mr. MOISE.)

Q. In the answer which is filed, in the fourth paragraph, it is alleged by the defendant that you were the agent of and represented the plaintiff, the Bruner Company. Is that so?

Mr. GRAHAM.—The same objection.

A. No, sir.

(Deposition of W. C. Ashenfelter.)

(By Mr. MOISE.)

Q. Did you act in any transaction between the plaintiff and defendant in this case on behalf of the plaintiff, the Bruner Company?

Mr. GRAHAM.—Objected to on the same grounds.

A. No, sir.

(By Mr. MOISE.)

Q. For whom were you acting?

Mr. GRAHAM.—The same objection. It is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

A. For the Menefee Company.

(By Mr. MOISE.)

Q. Did you ever receive any compensation of any kind from the Bruner Company for acting as their agent?

Mr. GRAHAM.—The same objection.

A. No, sir, not a thing. I treated him the same as any other customer.

(By Mr. MOISE.)

Q. At one time you did show the Bruner Company some of the correspondence which passed between you and the Menefee Company, didn't you? A. Yes.

Q. When did you do that?

A. Well, I don't just remember when it was. It was when Bruner told me that he had been to a great [108] deal of expense and loss and he would hold Menefee responsible for not filling that order, and he asked me to let him see such

(Deposition of W. C. Ashenfelter.)

correspondence as I had because he was going to insist on Menefee filling his order.

Q. When you took this order and sent it on to the Menefee Company, did you expect the Menefee Company to fill the order? A. Absolutely.

Q. And what was the first notice you had that the Menefee Company was not going to fill the order?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. I had a letter from them stating that it was specified lengths and widths and was not within their understanding of what they expected to receive.

(By Mr. MOISE.)

Q. Is that the letter to which you refer (referring to Defendant's Exhibit No. 22, dated December 2, 1919, from Menefee to Ashenfelter)?

A. No, what I am referring to was the other letter. This letter was received after Bruner gave me the original order.

(By Mr. GRAHAM.)

Q. By "this letter," you are testifying now relating to letter marked Defendant's Exhibit No. 22, dated December 2, 1919, from Menefee to Ashenfelter?

A. Yes. Isn't there a telegram there? I can't remember these dates.

(Deposition of W. C. Ashenfelter.)

(By Mr. MOISE.)

Q. (Telegram marked Plaintiff's Exhibit No. 9 shown witness.) Is that the telegram?

A. No, that is not the one. This letter is dated December 2 (referring to Defendant's Exhibit No. 22). It was before December 2.

Q. Before December 2? A. Yes. [109]

Q. A telegram to whom?

A. Didn't they wire that they would not accept the order? This may have been the first intimation I had. I cannot say about that positively because I cannot remember. This may have been the first word I received from them, that they would not accept the order (referring to Defendant's Exhibit No. 22, being letter dated December 2, 1919, from Menefee to Ashenfelter).

Q. What was the first notice you had that Menefee was not going to fill the order?

A. As near as I can recall, this letter was the first (referring to Defendant's Exhibit No. 22, being letter dated December 2, 1919, from Menefee to Ashenfelter). I thought may be they wired me, but I guess they did not. I guess this letter was the first.

Q. In this letter, Plaintiff's Exhibit 1, the Menefee Company says: "For your information, we have the best salesman in the United States, located in Philadelphia, Mr. W. C. Ashenfelter, Builders' Exchange Building. In the future you will please take any matters pertaining to prices

(Deposition of W. C. Ashenfelter.)

up with him, and you will get quicker results than if you wrote here."

Did Bruner show you that letter?

A. Yes, he showed me that letter.

Q. Did the Menefee Company send you a copy of it?

A. Yes, they sent me a carbon copy of it. I cannot remember exactly whether Bruner showed me that letter, but he told me he had got the letter. He might have showed it to me. I do not remember exactly, but he told me he had got the letter, and I think he showed it to me.

Q. Didn't the Menefee Company send you a copy of it?

A. Yes, sir. I got a copy before he told me anyhow some way or other. I don't remember just how. [110]

Q. In the sales of lumber which you made for the Menefee Company wasn't the custom between yourself and the company that before you could make a sale you had to get their approval of your sale?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant. No custom is pleaded, and it is not a proper manner in which to prove the alleged agency. Also that it is not within the issues made by the pleadings.

(By Mr. MOISE.)

Q. Answer my question.

A. No, sir. Absolutely not.

(Deposition of W. C. Ashenfelter.)

Q. State the method of dealing between you and the home office with respect to the sales you made?

Mr. GRAHAM.—The same objection.

A. I took orders for him right along, except if anything special came up, where I had secured an order below the market price, you might say, or below the prices that were quoted by others, in that case I would frequently wire or write the Menefee Company, if they would lower their price, because they had mills of their own that were cutting there and they bought lumber from others, and they frequently had stuff that they could buy up at a low price, and they would frequently make me a price that was way under anybody's else price, because they could buy it cheap and ship it, and so when I got an offer that was really below what I knew was a low price, sometimes I would ask them if they would accept it, and other times, if it was not very much below the price, I would take it and Menefee always accepted it. I never had any other order rejected that I can remember.

Q. In the two years you represented the Menefee Company of all the orders you took for them, which you have testified ran into [111] several million feet, is this the only one which they refused to fulfill?

Mr. GRAHAM.—The same objection.

A. This is the only order that I can recall on which there was any rejection or trouble or a dispute over.

(Deposition of W. C. Ashenfelter.)

Cross-examined.

(By Mr. GRAHAM.)

Q. Were you on a regular salary from the Menefee Lumber Company?

A. I was on a commission. That is practically the same thing as a salary.

Q. In other words, you received a commission on each order that was accepted?

A. No, I received a commission on every order that I took except this Bruner order.

Q. Then you are interested in this Bruner order to the extent of your commission on it? Is that the fact?

A. I was interested in it to get the business for Menefee and also to get my commission.

Q. What commission were you to receive?

A. I will tell you. When I first started with Menefee he gave me 50 cents a thousand feet, and I sent him some business. Then when Mr. Menefee came on here he said that he was so well pleased with the business, and he said, "I never allow anybody to ask me for more money. I am going to give you so much more commission," which was pretty near double, if I remember right. He said that he would allow me \$1 a thousand on any price that was \$20 or over at the mill, and 75 cents a thousand on anything that was under \$20, f. o. b. cars on the Coast.

Q. On this order, then, if it had been filled, what would have been your commission, approximately?

A. \$1 a thousand feet.

(Deposition of W. C. Ashenfelter.)

Q. And how many thousand feet of this character of lumber would be in 25 cars?

A. I should say roughly between 500 and 600 thousand. [112—113]

Q. Then you were interested in this matter in a commission to the extent of \$500 or \$600?

A. I was interested in it that much, yes. I was interested in whatever that commission amounted to—partially interested in it.

Q. Before this alleged letter was placed, as a matter of fact you took the matter up with Mr. Bruner? A. I took what?

Q. Took the matter up with Mr. Bruner, before ever any order was sent to the Menefee Lumber Company, had not you taken the matter up with Mr. Bruner?

A. I solicited the business from Bruner.

Q. And after you solicited Bruner, what did you do then? For the purpose of refreshing your memory, I call your attention to letter under date of November 14, which is in evidence as Defendant's Exhibit No. 23?

A. Yes. I wrote this letter to Menefee and asked if he could make a price on about one million feet at \$46 and \$47 per thousand feet.

Q. Hadn't you discussed the matter with Bruner before you wrote the letter?

A. I discussed with him what price I could get and what price he could pay.

Q. And in this particular transaction you first took up the matter of the price with Menefee

(Deposition of W. C. Ashenfelter.)

before you made the price to Bruner. Is that the fact?

A. No, absolutely, no. Bruner gave me an idea of about what he would pay for one million feet.

Q. I understood you to testify that it was not your habit to receive confirmation of orders from Menefee, but it is a fact that before you placed your alleged order you wrote under date of November 14 to the Menefee Company? A. Yes.

Q. And it is a fact, also, that you wired the price that Bruner offered subsequent to that letter of November 14, is it not? A. Yes.

Q. Before you took the order? A. Yes, sir.

Q. Your wire being in evidence as a Plaintiff's Exhibit under [114] date of November 21. Is that the fact? A. Yes, sir.

Q. From the testimony it appears that you received a corrected order covering these 25 carloads dated November 25. What did you do with that order?

A. No, I don't think I have that order here. I forget whether Bruner sent it to me. I think he did send me the order. You mean the one that had \$46 in it?

Q. That was corrected, was it not?

A. I sent it back to him and told him that was a mistake, that the price was \$48.

Q. And you received the corrected order, which is in evidence, Plaintiff's Exhibit 6, which I now hand you?

A. I do not think I sent that order out. I would

(Deposition of W. C. Ashenfelter.)

not take that order. I would not take the order because the price was wrong.

Q. This is the corrected order.

A. I do not think I sent the other one out because I would not take it. Menefee told me the price that I was to get, and I got that price, and when Bruner did not give me that price I sent it back to him.

Q. Just as soon as you forwarded that order on you received in due course of mail a reply from the Menefee Company, did you not, which has been offered in evidence here as Defendant's Exhibit No. 22? A. Yes.

Q. What did you do when you received that letter under date of December 2d?

A. I wrote and told him I was at a loss to understand his letter, that Bruner's order took in random widths and lengths, and he said "specified widths and lengths," and I asked him to explain to me what he meant by "specified," because it is not specified when there is a variety of widths and a variety of lengths, and I could not understand what he meant by saying specified. [115]

Q. On November 25, 1919, you secured this corrected order in which the price was correctly fixed from Bruner? A. Yes.

Q. Covering 25 carloads, which is a large order? A. Yes.

Q. Now, on December 2d, in due course of mail,

(Deposition of W. C. Ashenfelter.)

you received this letter which said they could not accept it? A. Yes.

Q. Did you immediately convey the contents of that letter to Mr. Bruner?

A. No, I do not think I did. Not right away.

Q. Do you mean to say that, after Bruner had placed that large order, and after you had received the information from Menefee that they would not fill it, you did not call that to the attention of Bruner?

A. No, not right away, because I wrote to Menefee, in answer to his letter, asking him to explain to me what he meant by saying "random widths and lengths," when I was giving him random widths and lengths, and I did not intend to say anything to Bruner until I got his explanation.

Q. Whatever his explanation was, he said he would not fill it. That is what he told you in the letter of December 2. Isn't that the fact?

A. Yes, that is correct.

Q. And you again wrote that Bruner was planning to place this order out among his trade and his customers, did you not?

A. I did not know exactly what he intended to do.

Q. You did not know what he planned?

A. No.

Q. Do you want us to understand that you said nothing to Bruner about his letter?

A. I do not think so. I do not think I said anything to him until I found out from them that

(Deposition of W. C. Ashenfelter.)

they would not or were not going to fill the order. If I remember correctly he came back at me and he said they had some cars, about two or four, I forget which, loading, and "Will Bruner accept those?" I told him yes, he will take those. Bruner said he would accept them. Then I still hoped and expected that they would fill the rest of the order. [116]

Q. You wrote that letter to him under date of November 14 upon which he sent you the wire of November 20th, didn't you? A. Yes, sir.

Q. You also received from the Menefee Company a wire under date of December 18 or 19, didn't you? A. The 18th or 19th?

Q. Stating absolutely, right in line with the letter of December 2, that the order would not be filled? A. Yes.

Q. I refer particularly to plaintiff's offered Exhibit No. 9 (telegram). You showed that wire to Bruner at once upon its receipt, didn't you?

A. I don't remember about that. I would not say that, when I showed it to him, because I always kept hoping that they would fill the order, that they would be able to buy the stuff and fill the order.

Q. If I understood Mr. Bruner's testimony correctly, he said that you left the wire immediately at his office on its receipt. If you left the wire there at his office, didn't you leave this letter of December 2, or advise him of it?

(Deposition of W. C. Ashenfelter.)

A. I did not say anything to Bruner about it until I was sure in my mind that they would not take it. Whether I left this there at the time or not I would not say at all because I cannot remember.

Q. I hand you Plaintiff's Exhibit No. 14 and ask you what date that letter was received?

A. I think I took the order down to him.

Q. And you also showed him this letter of December 18, did you?

A. I don't remember whether I showed it to them or not.

Q. When did you turn all of your file over in this matter to Mr. Bruner?

A. That I cannot remember. Bruner asked me for some letters or telegrams out of my file, to proceed with this matter, and I gave him some, but just when it was I really cannot remember at all.

Q. I ask you whether, in connection with this matter, you did not receive letters from the Menefee Company under date of December 23, [117] 1919, December 30, 1919, and February 2, 1920, copies of which I hand you, and the originals of which I request the counsel to produce.

(Originals produced.)

A. Yes.

Mr. MOISE.—They are objected to as incompetent, irrelevant and immaterial.

(By Mr. GRAHAM.)

Q. I hand you letters which have just been pro-

(Deposition of W. C. Ashenfelter.)

duced by counsel for the plaintiff dated respectively December 23, 1919, February 2, 1920, and December 30, 1919, and ask you whether you received these letters, in due course of mail, from the Menefee Company? A. Yes, sir.

Mr. GRAHAM.—I ask that they be received in evidence as Defendant's Exhibits.

Mr. MOISE.—They are objected to as incompetent, irrelevant and immaterial.

The letters just offered in evidence, are marked respectively Defendant's Exhibits Nos. 29, 30 and 31, and read as follows:

Defendant's Exhibit No. 29.

“December 23, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir:

We are returning herewith your order 123 as we returned the original order several days ago account order did not conform to our original quotation and acknowledgment of the order.

“Yours truly,

“O. R. MENEFEE COMPANY.

“By _____.”

(In pencil)

Ans'd

12-29

OFT-JB

Defendant's Exhibit No. 30.

“December 20, 1919.

“Mr. W. C. Ashenfelder,
Builders Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir: [118]

Referring to Bruner's order of the 20th, received this morning. Your letter of November 14th, reads in part as follows:

‘You can ship 3 to 4 cars more at a time, of the following, 3x6", 8", 10" and 12" x 36 ft. and under, and 4x6", 8", 10" and 12", 6x8, 8x8, 10x10, and 12x12 all lengths, up to 40 ft. and under, #1 com., rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say three to five or ten cars at a time.’

We wired you on November 20th, that we could handle an order on this basis and you wired us on the 21st, accepting same, we acknowledged same to you on the 24th. You will note that your request and our reply to you was for sizes shown and all lengths to be up to 40 foot. You evidently did not accept the order in this manner from Bruner as he gave you a blanket order with shipping instructions to be supplied, which is not in accordance with your letter to us.

We have never accepted this order from Bruner

(Deposition of W. C. Ashenfelter.)

and under the circumstances can not now accept it.

“Yours truly,

“O. R. MENEFEE COMPANY.

OFT-JB “By _____.”

(In pencil)

Ans'd 1-5-20 Ash.

Defendant's Exhibit No. 31.

“February 2, 1920.

“Mr. W. C. Ashenfelter,

Builders Exchange Bldg.,

Philadelphia, Pa.

“Dear Sir:

We are returning herewith letter addressed to you by Owen M. Bruner Company, and also the order which you enclosed with same. As we have written you before we told you we would accept an order for random lengths and widths and were in a position at that time to take the order had we received one in accordance with our wire to you, instead you sent us a couple of orders for specified [118½] lengths and widths.

It appears to us that you agreed to let Bruner give you specified orders.

“Yours truly,

“O. R. MENEFEE COMPANY.

OFT-JB “By _____.”

(By Mr. GRAHAM.)

Q. At the same time that you say you were representing the Menefee Company in this city and in

(Deposition of W. C. Ashenfelter.)

this territory, you were also representing other lumber companies?

A. No, no companies at all for rough or common lumber.

Q. You were representing companies here?

A. That sold mill work.

Q. Companies that sold mill work? A. Yes.

Q. Companies on the coast also that sold mill work? A. Yes.

Q. Then the Menefee Company was not the only company you were representing?

A. Yes, the Menefee Company was absolutely the only Company I represented to sell rough lumber for.

Q. But you were representing, regardless of character—

A. Mill work is an entirely different thing.

Q. You were representing mill work companies?

A. Yes, sir.

Q. Several of them? A. No. One.

Q. Is it not a fact that your business for the past several years has been the representative of different lumber companies in the nature of a broker? A. No, sir. I am not a broker.

Q. You are not?

A. No, sir; I am not a broker. A broker is one who buys lumber on his own account and sells it on his own account.

Q. Are you a salesman for lumber companies?

A. Yes.

(Deposition of W. C. Ashenfelter.)

Q. Isn't that the capacity in which you were acting for the Menefee Company?

A. Absolutely.

Q. And in no other capacity, either, were you?
[119] A. Salesman for them, yes.

Q. You did not own any stock in the Menefee Company, did you? A. No, sir.

Q. You did not have any management or direction of its affairs, did you? A. No, sir.

Q. Nothing beyond getting business in this territory?

A. But I took a great deal of interest for Mr. Menefee because I liked him very much. I tried to do all I could for him, for his own personal interest. I had no other object outside of my own commission, which was natural, but many times I would go out of my way to get business when I lost money really or to do a favor for Menefee because he wanted the business.

Q. You liked him so well that, without any authority being given by him, you turned over all your file of letters which passed between you concerning this alleged order. Isn't that the fact?

A. No, I did not turn them all over. I only turned over such stuff as he asked me for.

Q. As who asked you for? A. Mr. Bruner.

Q. Did you have the consent of Mr. Menefee to do that? Did you take it up with him?

A. No, sir; Mr. Menefee was dead.

Q. Or with any officer of the Allen-Murphy Com-

(Deposition of W. C. Ashenfelter.)

pany, successors to Menefee, to turn over private correspondence between you and the Company?

A. No, sir.

Q. You simply did it on your own account?

A. Yes, sir.

Q. What interest, if any, do you have in the outcome of this litigation?

A. Not a solitary thing. I am just out my time and everything else. All I am doing is that I am testifying to the facts and the truth in the matter so far as I know them and I am capable of.

Q. Before ever this instant action was instituted, is it not a fact [120] that you turned over all of these letters and swore to their truth?

A. I did not turn them all over.

Q. These particular letters which are offered in evidence, and swore to the truth of a brief that had been put in by counsel for the plaintiff?

A. What is the brief?

Q. Were there so many briefs that you have not knowledge of the brief you verified that was put in? Did you sign so many briefs that you do not remember? Did you sign more than one brief?

A. I do not think so.

Q. Did you sign any brief for them?

A. What do you mean by a brief?

Q. Any document.

Mr. MOISE.—I think, in fairness to the witness, if you want to ask him if he swore to a paper, you ought to show him the paper, so that he will know what you are talking about. Show him the thing

(Deposition of W. C. Ashenfelter.)

that he signed, then he will know what you are asking him about.

Mr. GRAHAM.—It is the affidavit sworn to before Mr. Matlock here.

(By Mr. GRAHAM.)

Q. Now that counsel has refreshed your memory, can you say then that you were duly sworn and said you had read the foregoing brief of argument, which you said earlier in your testimony you did not know what it was denominated and stated that the facts therein stated were true in every particular, and you subscribed to the truthfulness of the same?

A. If I read this over and signed it, that is what I did.

Q. Didn't you read it over before you signed it and swore to it for them? A. I guess I did.

Q. Don't you know?

A. No, I can't recall reading it all over.

Q. You did swear that it was truthful and correct and your acknowledgment [121] was taken before Mr. Matlock in this office. Isn't that correct? A. Yes, sir.

Q. And yet you want us to understand that you have not any interest in this controversy?

A. Not a bit. I have not taken any orders from Mr. Bruner in any way that had anything like compensation for anything for this and I have known Mr. Bruner for a long time.

Q. You want us to understand that you are not

(Deposition of W. C. Ashenfelter.)

receiving any compensation directly or indirectly in this matter?

A. Absolutely not a thing. I would not take it if it was offered.

Q. You heard Mr. Bruner's testimony as to the price named in this order which is in evidence as the market price for lumber of that character on or about November 25, 1919. Would you testify too, that that was the prevailing market price of lumber of that character at that time?

A. No, sir. The price was below the market price in that order.

Redirect Examination.

(By Mr. MOISE.)

Q. I think you testified in this transaction that you represented the Menefee Lumber Company and not Bruner? A. Yes, sir.

Q. That is absolutely true, is it not?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

(By Mr. MOISE.)

Q. There have been some letters offered in evidence by the defendant, and you wrote replies to the Menefee Company upon the receipt of those letters, didn't you? A. Yes, sir.

Q. I show you copy of letter dated January 10, 1920, to Menefee and ask you if you sent the original of which that is a copy to them? [122]

Mr. GRAHAM.—That is objected to as incom-

(Deposition of W. C. Ashenfelter.)

petent, immaterial and irrelevant and not within the issues made by the pleadings. A. Yes, sir.

Mr. MOISE.—I call for the original of letter dated January 10, 1920, from Ashenfelter to Menefee.

(Original produced.)

Mr. MOISE.—I offer in evidence the original letter.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and not proper redirect examination.

The letter is marked Plaintiff's Exhibit No. 32, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 32.

“Philada.

~~Portland, Oregon,~~ Jany. 10th -20.

“O. R. M. Co.,

I have your favor of the 5th inst., and I am at a loss to understand what you mean, when you say that the Bruner orders do not conform in any particular with your quotation to me. Will you please explain to me what you mean, and if his specifications are not in accordance with the plain understanding of your acceptance of that order I will endeavor to have him change same, as he is not unreasonable, and is entitled to know what you mean by not conforming with your quotations.

The order read which you accepted for 25 cars, for 2x4 to 12x12x10 to 40 ft long #1 Com. fir and

(Deposition of W. C. Ashenfelter.)

he has endeavored to be within those specifications, and if he has not, then please say just what you want, but it was on that proposition that you accepted the order, and you cannot cancel that order promiscuously just because prices have advanced, especially as Bruner has sold this material already to his trade, and they will insist upon his filling his [123] orders, which he will have to do, but if there is any way that he can arrange his specifications so as to meet your convenience in any way, I am sure he will try to meet you half way, but as for your just cancelling that order, you are in the wrong as you conclusively accepted the same both by wire, and by letter, and if I am wrong in any way I am now waiting to have the matter explained where I am in the wrong, but so far none of your letters have attempted to show me where I am in the wrong, and I was absolutely under obligation to take that order after you accepted it, and awaiting your prompt reply,

“Yours truly,

WCA-A

“W. C. ASHENFELTER.”

(By Mr. MOISE.)

Q. Counsel asked you if you had read over this brief in which Mr. Bruner's claim against the Menefee Lumber Company was set forth, and if you made the affidavit to it, in which you said that you had carefully read over the foregoing brief of argument on behalf of the Bruner Company against the Menefee Lumber Company, and find that the facts therein stated are true and correct

(Deposition of W. C. Ashenfelter.)

in every particular and hereby subscribe to the truthfulness and correctness of the same. You made such an affidavit as that, didn't you?

A. Yes, sir.

Q. And you read that brief over? A. Yes, sir.

Q. Why did you make an affidavit that that was a true and correct statement of the facts of the case? A. Because he stated the facts in it.

Q. In other words, because the facts stated in that brief were true and correct. Is that correct?

Mr. GRAHAM.—That is objected to on the ground that it is leading. [124]

Mr. MOISE.—I will withdraw that question.

(By Mr. MOISE.)

Q. In this letter dated January 10, 1920 (Plaintiff's Exhibit No. 32), which has been offered in evidence, it appears that this stationery is the stationery of the Menefee Company of Portland, Oregon. Where did you get that stationery from?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, irrelevant and immaterial and not within the issues made in the pleadings.

A. Ferris & Company, Philadelphia.

(By Mr. MOISE.)

Q. And who ordered it printed?

Mr. GRAHAM.—The same objection.

A. O. R. Menefee.

(By Mr. MOISE.)

Q. He ordered it printed? A. Yes, sir.

Q. And how did it get into your possession?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

A. He told me to order it and use it and have the company send him the bill and he would pay us.

Q. You will observe that that letter-head has on it "Portland, Oregon."

A. Menefee sent me letter-heads. Menefee sent me his letter-heads on white paper, and also this yellow paper for copies, but in office correspondence I saved the white letter-heads and used these yellow ones. He sent me two or three packages by express.

Q. Counsel for the defendant has asked you why it was that you turned over some of the correspondence to Bruner which passed between you and the Menefee Company. I now ask you when you did turn over such correspondence to Bruner and why? [125]

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not proper redirect examination.

A. I will tell you why.

(By Mr. MOISE.)

Q. When, first. Then, why.

A. I do not remember exactly when I turned it over to them but it was some time after they definitely said they would not fill the order. The reason I turned it over to them was this, that my first interest was for the Menefee Company. My next interest was to protect that contract I took in good faith and they accepted it in good faith,

(Deposition of W. C. Ashenfelter.)

and when he came back and said "random widths and lengths," when they say "specified," they have got to get that out of their heads. When they say "Specified," and then put in several widths and several lengths, you have to say specified in random widths and lengths. You can't say specified and leave out in random widths and lengths, because that is wrong. Then after all that he asked for a broad, blanket order, and came back and said that was not what he wanted. I could not understand his understanding. I wrote him. I said, "I want you to know, for my own satisfaction. It gives you a leeway. It is random widths and lengths absolutely." On the other hand, I told him further that if he shipped more or less of any widths or lengths in any car or more or less cars that Bruner would accept it. Now he accepted that order, and he put me in a bad place, as well as dishonoring himself, and he used the excuse to say that he did not understand the order because it was not random widths and lengths. It was absolutely random widths and lengths. If you say "specified" you must say "specified in random widths and lengths," which it was.

The reason I turned those things over to Bruner was [126] simply as a matter of honor. That is all. He was in honor bound to take that order for that price, that he had the right to fill it, and Bruner would collect if he did not fill it.

(Deposition of W. C. Ashenfelter.)

Q. Didn't he tell you to add your commission to the original price of the lumber?

Mr. GRAHAM.—That is objected to as not proper redirect examination.

A. Yes, in the telegram.

(By Mr. MOISE.)

Q. Did you increase the price of the lumber so as to include your commission?

A. Yes; he told me \$47. My commission was \$1. I made the price to Bruner \$48.

Mr. GRAHAM.—I make the same objection to that question and answer.

(By Mr. MOISE.)

Q. So that, if this order had been fulfilled, as a matter of fact, at Menefee's request, he would have been freed from paying the commission, and you would have collected it from Bruner, would you not, from the increased price of the lumber?

Mr. GRAHAM.—The same objection.

A. I would have been entitled to it, I suppose.

(By Mr. MOISE.)

Q. Did you tell Bruner anything about that?

Mr. GRAHAM.—The same objection.

A. No, sir. The reason I submitted the price to Menefee was because it was below the market going price \$7 or \$8.

Q. \$7 or \$8 below the market price?

A. Below the market price, the going price, yes.

Q. That was the reason you submitted it to Menefee?

A. Yes, to see if he would accept it. [127]

(Deposition of W. C. Ashenfelter.)

Q. Had you got Menefee's permission to accept it?

A. He accepted it, and then the market advanced very rapidly right after that, to \$7, \$8 and \$10 more within perhaps 30 days.

Recross-examination.

(By Mr. GRAHAM.)

Q. I have a very few more questions to ask you. As a matter of fact, then, Mr. Bruner is in error when he says the price quoted was the prevailing market price at the time the order was taken?

A. Mr. Bruner was closer in touch with the market conditions than I was because he was dealing exclusively in lumber, but as near as I know the general market prices of lumber. I know from other sales that it was way below that going price.

Q. In your opinion, it was from \$7 to \$8 below the prevailing market for that character of lumber at the time the order was taken? A. Yes.

Q. And 30 days from that date lumber had gone up so that there was that vast difference in the 30 day period?

A. I would say that, taking the \$7 or \$8 below, it advanced at least \$8 or \$9 above the market price, which would bring it around \$15, \$17 or \$18. If he had to go out and buy lumber at that time he would have probably had to pay around \$15 or \$18.

Q. All within a period of 30 days during November?

A. Yes, sir; because at that time there was a temporary abnormal condition, probably brought on on account of the war, but there was a temporary ab-

(Deposition of W. C. Ashenfelter.)

normal condition. There was no real steady market.

Q. You have given at some length the reasons why, without the consent of Menefee or any of the Menefee people, you turned over all of this private correspondence to Bruner.

A. I did not turn it all over.

Q. That which has been offered in evidence relating to this alleged contract? [128] A. Yes, sir.

Q. You turned that all over, didn't you?

A. Yes.

Q. Do you know when?

A. I turned it over when he requested me to.

Q. Do you want to be understood as saying that the order which you forwarded was strictly in accordance with the preliminary inquiries you made under date of November 14?

A. I would not say strictly but in a general sense it was, absolutely.

Q. With reference to this stationery, and these cards, I understand you to testify that your dealings were all with Mr. Menefee? A. Yes, sir.

Q. Did you have any dealings with any other officers than Menefee?

A. In regard to printing?

Q. Yes.

A. No. Well, yes; I think they wrote me that they were sending me some letter-heads.

Q. What other officer did you have dealings with than Menefee?

A. It was always signed by the Menefee Company.

(Deposition of W. C. Ashenfelter.)

Q. Mr. Menefee is dead now, is he not?

A. Yes, sir.

(By agreement between counsel for the respective parties, the signature of the witness is waived.)

[129]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Known as ALLEN-MURPHY COMPANY,
a Corporation,

Defendant.

Portland, Oregon, November 16, 1922.

JOHN M. BOYLE, Tacoma, Washington, Attorney
for Plaintiff. SIDNEY GRAHAM, Attorney
for Defendant.

Before R. S. BEAN, District Judge.

J. E. MANLEY5

J. P. KEATING18

Plaintiff rests21

H. B. VAN DUSEN22

Defendant rests24

[130]

Mr. BOYLE.—I offer in evidence the depositions
of Mr. Bruner and Mr. Ashenfelter, taken on behalf
of the plaintiff.

Mr. GRAHAM.—We think the moment this is attempted to be introduced in this matter, on this deposition of the president of the plaintiff company and of the agent there is such a showing made as to entitle this defendant to a directed verdict. Now, without urging the particular objections of that kind and to make the record satisfactory, will counsel state the effect of the depositions and then let the entire testimony direct and cross-examination go in.

COURT.—What is the objection?

Mr. GRAHAM.—Our first objection, may it please the Court, is that the contract is one with Ashenfelter, a sales contract; it is direct with him.

COURT.—That, I assume, goes to the merits of the case.

Mr. GRAHAM.—That goes to the merits and is also a variance; they have pled a contract with us and have set out *in haec verba* an order addressed to Ashenfelter, and the courts in many states have held that when an instrument is set out *in haec verba* it concludes the record and the instrument speaks for itself. We have authorities that when an instrument is directed to a man without designation, even though he does sign with the designation “Agent” the contract is a contract with the agent and not with the principal.

Secondly. That the depositions of Bruner and Ashenfelter will show that the entire matter originated with a letter of inquiry of November 14, 1919 by Ashenfelter to us in which he invited quotations for Bruner on random widths and lengths. Quota-

tions were made on that basis and the orders came for specified [131] widths and lengths; the offer and acceptance are in opposition, one to the other, so there was never a contract. The depositions themselves will show that Bruner was advised of this situation.

Third. And, regardless of the fact of either of these two points, the thing we think is absolutely conclusive, the order itself which they will offer in evidence contains this remarkable provision—I don't want to make a statement and I will simply say this in passing—when the depositions are read I am sure the court will have the same impression I had when I attended—there was a very close relation between the alleged agent and Bruner—very good personal friends, and everything was done—to use plain terms—in order to stick the lumber company here in Portland, and in carrying out his little plan, this order will show they went too far and this covers a vital legal objection to the validity of the sales contract.

COURT.—Your objection now goes to the merits?

Mr. GRAHAM.—And also to the admission of the testimony.

COURT.—Let the depositions be offered and make your objection on the final argument of the case.

Mr. GRAHAM.—I want to say this final thing: Referring to the order which is the alleged contract, it says: “To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as

we book the business.” In other words the contract lacked mutuality. If prices went down, no orders would be booked; if prices went up they would book orders. This was a wholesale lumber merchant supplying retail yards, and the courts are unanimous in holding such orders void.

Mr. BOYLE.—The depositions show that some time last year the plaintiff had some dealings and correspondence with the [132] defendant Menefee Lumber Company and had purchased some lumber, and some of the transaction was hardly completed at that time, and at that time they received an intimation and a letter from the Menefee Lumber Company stating that in the future they should take up with Mr. Ashenfelter all matter of prices; that they had the best agent in the United States right there in Philadelphia, for them to deal with him, and thereupon the plaintiff, pursuant to that, entered into negotiations with this agent, who, the depositions show, was appointed and supplied at the defendant's cost, with stationery, with letter-heads holding himself out as the eastern agent for the Menefee Lumber Company, and relying upon the letter of instructions telling them to go to this agent who would make prices—that he was the best agent in the United States and knowing that he held himself out as that; the depositions show that they actually supplied him and paid for the printing of the stationery for the Menefee Company by Ashenfelter, eastern agent; the depositions will show that they entered into this agreement and that he signed this agreement as the agent and

that the prices were agreed upon and that when they sent in to Mr. Ashenfelter, the agent of the defendant, the order he said that there was a mistake in the order of two dollars per thousand, that it ought to be two dollars a thousand more; they said they agreed that was a clerical mistake in the making out of the order and sent a corrected order a day or two afterwards.

Mr. BOYLE.—We submit the two depositions for the Court's perusal, without reading them.

COURT.—With the understanding can be read.

Mr. GRAHAM.—Subject to the objections contained in the depositions and the objections that they show variance and the contract is void for want of mutuality. [133]

Mr. BOYLE.—We have a couple of witnesses whose testimony is directed to the quantity of lumber contained in the twenty-five cars, for it may be a little indefinite as to what the capacity of these cars might be, and while the deposition of one witness states what the capacity of these cars might be, and while the deposition of one witness states what the capacity would be we want to further establish that to show what the amount of this breach would be, and then we will have further witnesses in regard to prices. [134]

The testimony of the witnesses examined orally at the trial is as follows:

Testimony of J. E. Manley, for Plaintiff.

J. E. MANLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOYLE.)

Mr. Manley, where do you reside?

A. Tacoma, Washington.

Q. How long have you resided there?

A. Since 1903.

Q. What business are you engaged in?

A. Lumber manufacturing and selling.

Q. How long have you been engaged in that business? A. Since I came there in 1903.

Q. Will you state to the Court to what extent you are engaged in manufacturing and dealing in lumber?

A. At the present time we have a sawmill of approximately 100,000 feet per day outfit at Fairfax, Washington.

Q. Are you an officer of the company?

A. I am secretary of the company.

Q. What is the name of your company?

A. Manley-Moore Lumber Company.

Q. How long have you been operating that plant?

A. Been operating a mill since 1907; operating this mill since 1910.

Q. What is the extent of your operations there?

A. We have approximately 100,000 feet per day output.

(Testimony of J. E. Manley.)

Q. Are you connected with any other manufacturing establishment?

A. Interested with the Washington Manufacturing Company.

Q. What is their business?

A. That is manufacturing mill work and finishing lumber and porch material.

Q. Where do you market your lumber?

A. Throughout the United States and to some extent in foreign countries. [135]

Q. Do you have charge, direct charge yourself of the sales of lumber?

A. I have charge of the sales of the Manley-Moore Lumber Company.

Q. Did you have charge or were you acting in this same capacity in the year 1919? A. I was.

Q. You were acquainted then with the market value of lumber in November and December 1919.

A. I was.

Q. I show you, Mr. Manley, an order that is referred to in part of the deposition that is before the Court, and ask you to examine that. Mr. Manley, can you tell the Court what if any difference there was in the market price of lumber as described in that order on the 25th of November, 1919, and the 19th day of December of the same year.

Mr. GRAHAM.—I object on the ground that it is incompetent, immaterial and irrelevant, not dealing with the issues of this proceeding, but in order to expedite matters and save repeating this objection—I think I have outlined the theory on which we are

(Testimony of J. E. Manley.)

proceeding—and it can be understood that these general objections are made; we will not renew them.

COURT.—This goes to the question of damages, assuming there is a contract, I understand?

Mr. GRAHAM.—Yes.

Q. You may state, Mr. Manley.

A. This order specified rough lumber, 2x4, 2x12; I would consider the difference in value as of these two dates,—the market was advancing rapidly at that time—would be about six dollars per thousand.

Q. What would you say then in reference to the order itself, that is before you, at the prices stated in that order; what would you say was the difference in the value, market value and the prices therein quoted?

A. I would like to be explicit in this on account—

Q. You explain to the court. [136]

A. —of the matter that was brought up here. This order reads twenty-five cars 2x4 to 2x12—12 to 40 feet, and price \$48.50, delivered at eighty cent rate, which seems to be \$22.00 at the mill. That is my opinion of the market price at the time if there were nothing further on the order, but the order further specified “to be shipped in sizes and lengths as wanted.” That changes it. If the order was given with that provision I would think would be considerable under the market if placed at \$22.00. I would think it would be at least six dollars under the market. A great many would not make such an order at all.

(Testimony of J. E. Manley.)

Q. Then, Mr. Manley, let me ask you what then would be the difference between the price in that order and the market value on the 19th of December?

A. This order as specified with that provision there, giving the buyer the privilege of specifying at a later date and specifying certain sizes, I would consider this at least twelve dollars under the market a month after it was taken. This was December?

Q. December 19th? A. Yes.

Q. Do you think would be a difference then of twelve dollars?

A. Yes, I would like to explain this on account of that proviso there that has been mentioned heretofore.

Q. That it gives the—

A. Gives the purchaser the privilege of specifying the exact lengths at some future time.

Q. Then, Mr. Manley, would this in your opinion be considered an order, specific order, or a random length order?

A. Taking this whole order I would consider it a specific order absolutely.

Q. That means specific as to the—

A. Lengths and sizes.

Q. It wouldn't then be a random length order?
[137]

A. No, not in my opinion.

Q. Now, will you state to the Court what in your opinion is the capacity of a carload of lumber such

(Testimony of J. E. Manley.)

as you describe here, that is the cars generally used in shipping from the coast to eastern points, as indicated there?

A. Well, rough lumber of this description will load all the way from 18,500 to 30,000 feet to a car. 18,500 would be practically the minimum because you have to get fifty thousand pounds on a car. I would consider an average loading would run about 22,000.

Q. About 22,000?

A. About 22,000. You will get some even larger than 30,000; probably they will run from twenty-one to thirty thousand.

Q. Now, Mr. Manley, I presume it may be clear to lumber men; it isn't to me and may not be to the Court. What is meant in that order, that eighty cent rate New York and fifty cent rate Philadelphia, or whatever it says there?

A. It reads here: "Price delivered on a New York or eighty cent rate." The rate at that time on lumber from Pacific Coast Terminal points to New York was eighty cents per hundred pounds. A thousand feet of lumber is estimated at 3300 pounds, which would make the rate offered in dollars and cents to New York approximately \$26.40. And this seventy-eight cent rate, that is the rate to Philadelphia at that time; that means seventy-eight cents per hundred pounds, and figuring 3300 pounds to a thousand feet of lumber.

Q. I take it from that order that the rate specified

(Testimony of J. E. Manley.)

and the price specified was to be the price of the lumber with the freight added?

A. Cost at the mill including freight to New York or Philadelphia.

Cross-examination.

(Questions by Mr. GRAHAM.)

I will call your attention to defendant's [138] Exhibit 23, which is a letter written under date of November 14, 1919, written by one Ashenfelter to the defendant company, and ask you to read that letter if you will.

A. Shall I read this aloud?

Q. No, just read it to yourself.

Mr. BOYLE.—I think, if the Court please, this is not cross-examination. We didn't ask him about that at all.

Mr. GRAHAM.—May it please the Court, they have asked him his construction of this order. They have gone into the difference between an order for specified widths and random widths and lengths. The question I want now is first to direct his attention to this letter with which the transaction originated, then I will ask if the letter to which they directed his attention is not in accordance with the letter of inquiry, and that is information the Court should have.

Mr. BOYLE.—That is not proper cross-examination.

COURT.—Not strictly cross-examination, but I suppose he just as well testify now on that subject as later.

(Testimony of J. E. Manley.)

Mr. GRAHAM.—Yes, as it is before the Court without a jury. A. I can read the letter?

Q. Yes, if you wish.

A. I can understand it better if I do. This is a letter, I presume it is from Ashenfelter, to the Menefee Company which says: “Our good friend Bruner here says if you want some business in number one common fir rough, and will make a price on such stuff as the following will immediately place his order for same. You can ship three to four cars or more at a time of the following, 3x6” 8”, 10” and 12” x 36 feet and under and 4x6”, 8”, 10” and 12” 6x8, 8x8, 10x10 and 12x12 all lengths up to forty feet and under, number one common rough, delivered at Philadelphia and could ship at your convenience [139] and string the cars along, say three or five or ten cars at a time; if you will make a price of \$46.00 to \$47.00 per thousand feet. If so he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time? Will you kindly give this your best consideration, and please advise me promptly, and oblige.”

Q. Now, counsel for plaintiff has directed your attention to the alleged order which was offered in evidence as Plaintiff’s Exhibit 6, and I will ask you if that order is in accordance with that inquiry?

(Testimony of J. E. Manley.)

Mr. BOYLE.—Object as immaterial and irrelevant because this correspondence is between Ashenfelter and the Menefee Lumber Company and it is immaterial if the contract binds the agent—we have established agency; if it is binding it is immaterial, and therefore I object on that ground.

Mr. GRAHAM.—If the Court please, if the plaintiff were advised of the letter it is material certainly.

COURT.—He can answer, and what value it has I suppose is a question for the court.

A. Well, this letter here starts in to outline what I would call a random order, with the exception where he says, “If so he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time.” Now, it appears to me that he has gone the limit in sending the order with no specifications attached and no idea what they will be, and retains the privilege there of specifying sizes and lengths as wanted.

Q. These will perhaps aid you in the matter. I hand you plaintiff’s Exhibit 7, which was a suborder sent under that blanket order of November 25th, and ask if you will say that was in accordance with [140] that letter of November 14th, which is in evidence as Plaintiff’s Exhibit 23?

Mr. BOYLE.—Object to that as incompetent, irrelevant and immaterial.

A. Well, the only ground in the original correspondence—in this letter that would give him the privilege of specifying an order like that, he has 24, 32 and 28 foot lengths only—his sentence is

(Testimony of J. E. Manley.)

just right where he speaks "to be made up of various sizes above stated and in a few cars at a time." There he intimates that he would specify what each car was to contain, but at first blush you would evidently take that for a random order to load anything you want from the mill.

Q. Mr. Manley from your experience of a number of years as a lumber man, would you say that blanket order which is in evidence as Plaintiff's Exhibit No. 6, and the specifications of the suborder sent under that, which is in evidence as Plaintiff's Exhibit 7, are in accordance with that inquiry; taking the letter of November 14th as a whole, and the customs and practice in the lumber industry—the customs and practice that prevail in the lumber industry. You can answer that yes or no and make any explanation you wish.

A. Will you repeat that?

Q. (Read.)

A. Should I answer what I would do if I got a letter like that?

A. You can first answer yes or no and then make your explanation.

Mr. BOYLE.—If it can be answered by yes or no; if not state why and what your ideas are.

A. If I got a letter like that I would quote a price, and call attention to the fact that it must be strictly random and we had the privilege of shipping when we had anything in those sizes.

Q. Of course, Mr. Manley, you are called as a

(Testimony of J. E. Manley.)

witness for the plaintiff; I think you want to be fair. That doesn't fully answer that question.

A. I want to try and answer it. [141]

Q. We want you to answer it from your knowledge and experience as a lumberman and when a letter—and I refer now to Defendant's Exhibit 23, which is the letter of November 14, 1919—says "you can ship three to four cars or more at a time of the following, 3x6", 8", 10" and 12" 36 feet and under" and then you have a suborder which specifies, for example, fifty pieces 24 feet long, 2x6, would that be in accordance with that letter of November 14th?

A. Not that first part, but putting in that last sentence it might be.

Q. Wouldn't it be a very strange construction?

A. I would consider myself negligent if I didn't call his attention to the fact that we must be permitted to ship anything within these sizes that we might have, rather than as he is going to specify.

Q. I know, but Mr. Manley, this is approaching from the other viewpoint. We are asking you with reference to a letter which leaves the widths and lengths random, except as you say, for a final clause, which says "He will place an order for a million feet."

A. Read it there, because maybe I misunderstood that.

Q. I wish you would just read that again, and see if you will still have the same explanation. You will see it refers immediately back to the preceding portion.

(Testimony of J. E. Manley.)

Mr. GRAHAM.—And the reason I ask this question, however plain this order may be, is because it goes to the merits of this whole controversy.

A. “Our good friend Bruner here says if you want more business in number one common fir, rough, and will make a price on such stuff as the following, he will immediately place his order for same. You can ship three to four cars or more at a time of the following, 3x6”, 8”, 10” and 12” by 36 feet and under, and four by six, eight, ten and twelve, 6x6, 8x8, 10x10 and 12x12, all lengths up to forty [142] feet and under, number one, common rough delivered at Philadelphia, and could ship at your convenience and string the cars along, say three to five or ten cars at a time, if you will make him a price of \$46.00 or \$47.00 a thousand feet.—”

Q. Where is there anything up to that point—

A. That is absolutely a random order up to that point.

Q. Exactly. Now, how is there any language that modifies that order and makes it other than a random order? Where is it?

Q. “If so he will—”

Q. When it says “If so”? A. “If so”—

Q. Yes.

Q. —“he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time.”

Q. And which refer back to the preceding lines which you have read; doesn't it? “If so”?

A. But he speaks of making up; “to be made

(Testimony of J. E. Manley.)

up of these various sizes and a few cars at a time.” There is where I would be afraid if I were handling it he would want us to ship certain lengths in one car and certain lengths in another. This is the kind of an order that is often placed, and get us into trouble.

Q. Now, Mr. Manley, isn't there a very great difference and distinction between an order for random widths and lengths and an order for specified widths and lengths? A. Yes, indeed.

Q. And isn't the market price for an order of the latter kind much greater than the price for an order to ship random widths and lengths?

A. Very much.

Q. Isn't the cost of shipping lumber to specified widths and lengths very much greater than shipping to random widths and lengths? A. Very much.

Q. Now, the market price that you quoted, or that you gave evidence [143] concerning, was that based on a shipment to random widths and lengths or specified widths and lengths?

COURT.—He gave both, I think.

A. Well, I gave both.

COURT.—Yes, one six and the other twelve.

Mr. BOYLE.—No, if the Court please; this six and twelve dollars, that meant this order was under the market price and the market had advanced, so that made a total of twelve. That wasn't as the court understands it, was it?

A. I said that that order as specified, that is having this proviso there permitting him to specify, I

(Testimony of J. E. Manley.)

would consider the price on the order as at least six dollars under the market at the time it was placed; if it didn't give him a chance to specify I would consider that approximately the market price.

COURT.—What would you consider the difference between the prices specified in that order and the market on December 19th?

A. Taking that exact order I would consider twelve dollars, because I consider that order six dollars under the market.

Q. This further question on that: If the order had been for random widths and lengths, then I understand you testify that on November 25, 1919, the price fixed in the original order was the market price? A. November 25, 1919?

Q. Yes.

A. No, I testified if that were random lengths it would be the market price, but having that proviso there specified, I considered—

Q. It six dollars underneath the market?

A. Yes, sir.

Mr. GRAHAM.—I may say, may it please the Court, that December 2d, immediately when we received this order in due course of mail, we returned it. That is preliminary to this question.

Q. What was the price of lumber of the kind and character referred [144] to in this order, the market price, on say December 7, 1919?

Mr. BOYLE.—I object as immaterial because there is nothing to show any notice was ever given

(Testimony of J. E. Manley.)

of any breach until the 19th; this is going into a field we are not prepared to meet.

Mr. GRAHAM.—The evidence will show I asked the witness Bruner immediately when this letter of December 2d returning this order was sent to Ashenfelter, if it had not been communicated to him. He said he would not say it had not. This is a question we asked on cross-examination.

Mr. BOYLE.—And the deposition further shows that the first notice he had was on the 19th, as I read it.

Mr. GRAHAM.—No, I read it very carefully, and was there when the deposition was taken.

Mr. BOYLE.—I may be mistaken.

COURT.—Go ahead.

A. Well, the price on November 19th was, we will say, \$22.00—\$23.00, and on December 19th, it was according to the business that I looked over—that we were taking at that time—it averaged about six dollars more. Now, you asked what it would be on December 7th?

Q. Yes.

A. Now, I couldn't answer that without looking at orders that we took or somebody else took at that time, but it would probably be between those costs, because the market was advancing then on account of the great scarcity of cars. Lumber was scarce in the east and you couldn't get it there, and if anything could be gotten there they were bidding for it; the sawmill men didn't make the price, it was made by the bidder,

(Testimony of J. E. Manley.)

so I would just say it probably had advanced proportionately between those dates, so that on the 7th it probably had advanced maybe two or three dollars, because that was in the time—from the middle of November [145] until approximately the 15th of February was the time the market made that rapid advance, and at that time it began to fall off.

COURT.—Did I understand you to say, Mr. Manley, that the price specified in that order was for random lengths—market price for random lengths at the date of it?

A. Yes, I would consider that the proper price for random lengths, but I consider the order for specified lengths.

COURT.—And for specified lengths it was six dollars below the market?

A. Yes, and that further proviso “to be shipped as wanted”; not only specified lengths but specified time of shipment.

Witness excused.

Testimony of J. P. Keating, for Plaintiff.

J. P. KEATING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOYLE.)

Mr. Keating, where do you reside?

A. Portland, Oregon.

Q. And what is your business?

(Testimony of J. P. Keating.)

A. At the present time I am engaged in buying and selling lumber or forest products.

Q. How long have you been engaged in that business?

A. In all lines since—for the last sixteen years as well as manufacturing.

Q. Could you tell the jury what the ordinary capacity of a car of lumber known as number one common fir lumber—the capacity of a carload would be, to be shipped between here and New York, say?

A. What kind of lumber would that be, please?

Q. Number one common fir, rough lumber.

A. Number one common Douglas Fir?

Q. Douglas Fir, different lengths, 2x4, 12x12, 12 to 40 feet long. [146]

A. If that stock is sawn full size, the average would be about 21,000 feet to the carload; if sawn scant as sometimes practiced, especially if it goes on a long freight rate, and the manufacturer sells on a delivered price, it would probably carry about 24,000 feet to the car.

Q. Then you say the average would be something between these two figures?

A. Depending as I said on the condition in which the lumber is manufactured.

Q. This order that is introduced in evidence here says price delivered on a New York or eighty cent rate, \$48.50; what does that New York or eighty cent rate mean?

A. May I look at it? If you want me to interpret

(Testimony of J. P. Keating.)

it, I suppose your question means with reference to the literal writing?

COURT.—No, what does eighty cent rate mean in a writing of that kind?

A. As written, your Honor?

COURT.—Yes.

A. The rate per hundred pounds on which the freight charges are computed from Pacific Coast points and the northwest to New York City.

Q. Then that price delivered on New York or eighty cent rate, \$48.50, that would mean the price of the lumber and freight added?

A. Yes, the freight added at eighty cents per hundred on an estimate of so much per thousand feet for the kind of lumber loaded or sold.

Cross-examination.

(Questions by Mr. GRAHAM.)

How long since you have been in the lumber business? A. Sixteen years.

Q. I will call your attention to Plaintiff's Exhibits 6 and 7 and to Defendant's Exhibit 23, and ask you if the exhibits of the plaintiff, 6 and 7 are in accordance with the inquiry made in Defendant's Exhibit 23?

Mr. BOYLE.—That is objected to. [147]

COURT.—I think the objection is well taken.

Mr. GRAHAM.—I will ask to make this witness my own witness to save time.

COURT.—Very well.

A. Is it all right, your Honor?

COURT.—Yes.

(Testimony of J. P. Keating.)

A. I think this was clear.

Mr. GRAHAM.—It will save time.

Mr. BOYLE.—That is not reference to the letter of inquiry.

Mr. GRAHAM.—This in reference, Mr. Boyle, to the letter from Ashenfelter to the defendant company.

Mr. BOYLE.—We make the same objection.

COURT.—I understand your objection. You say you are not bound by the correspondence between the agent and the principal unless it came to your knowledge.

A. Answering your question, comparison of the contents of Exhibit 23, letter dated November 14th, in my opinion varies from the contents as to the commodity sold in exhibits 6 and 7, as I say, the sizes mentioned in the exhibit 6 and exhibit 7 that are not mentioned in exhibit 23—two inches thick—namely two inches thick, while exhibit 23 specified a minimum thickness of three inches; also if I am to consider Exhibit 7 a supplemental order to Exhibit 6—

Q. You are to so consider it.

A. —which is presumed to be confirmatory of Exhibit 23, I would say that Exhibit 7 is at further variance in that I observe that it carries several items specified as to thickness and width and length, which are not the regular group of lengths as we know them in the industry.

Q. Now, Mr. Keating, will you say generally whether or not the inquiry of November 14th, which

(Testimony of J. P. Keating.)

is in evidence as Defendant's Exhibit No. 23 is not an inquiry for random widths and lengths? [148]

A. It is an inquiry, Exhibit No. 23, for random thicknesses, widths and lengths.

Q. And now will you say whether Plaintiff's Exhibits 6 and 7 are or are not for specified widths and lengths?

A. Plaintiff's Exhibit No. 6 in as far as the item of sizes is concerned covers specified thicknesses, widths and lengths but the stipulation is added—I mean random—but the specification is added that it is to be shipped in sizes and lengths as wanted, which would in my opinion change it from the character of a random to a specified order.

Q. Now, what about Plaintiff's Exhibit 7?

A. Exhibit 7 I have no hesitation in saying is a specified order.

Witness excused.

Plaintiff rests.

Testimony of H. B. Van Dusen, for Defendant.

H. B. VAN DUSEN, a witness called by the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. GRAHAM.)

Mr. Van Dusen, what is your business?

A. Lumberman.

Q. For how many years have you been engaged in such business? A. A little over twenty years.

Q. Are you connected at this time with any lumber company?

(Testimony of H. B. Van Dusen.)

A. Yes, the Inman-Paulsen Lumber Company.

Q. In what capacity? A. Manager.

Q. As manager of this company, do you sell a great deal of lumber? A. Yes.

Q. I will call your attention to Defendant's Exhibit 23 and Plaintiff's Exhibits 6 and 7 and will ask you if the alleged orders evidenced [149] by plaintiff's exhibits 6 and 7 are in accordance with the inquiry evidenced by Defendant's Exhibit 23?

Mr. BOYLE.—Subject to the same objection.

A. No, they are not the same.

Q. Will you explain to the Court wherein they differ? A. What exhibit is this?

Q. The letter is Defendant's Exhibit 23.

A. Twenty-three, which appears to be confirmed by Exhibit No. 6, calls for so many cars of sizes from 2x4 to 12x12, with lengths from 12 to 40; Exhibit 7 calls for specified sizes and specified lengths.

Q. Mr. Van Dusen is there any difference between the value of lumber to be shipped random widths and lengths and the value of lumber—market value of lumber to be shipped to specified widths and lengths? A. There is.

Q. There is a distinction and difference that is well recognized in the lumber industry? A. Yes.

No cross-examination.

Witness excused. [150]

Mr. GRAHAM.—We have other witnesses to the same point but I don't believe they are necessary. The plaintiff's own witnesses support that.

It has been stipulated, as I take it, between coun-

sel, but in the absence of the court reporter, that the counterclaim of the defendant is admitted.

COURT.—That is \$600.00.

Mr. GRAHAM.—We therefore rest and move the Court for a directed verdict in favor of the defendant against the plaintiff, and for a verdict on our counterclaim.

Mr. BOYLE.—From the depositions, if the Court please, it seems that the exhibits are referred to by number and not attached to the depositions. These are all exhibits.

Mr. GRAHAM.—Defense rests. There is a point which I do think it might be well to discuss at this time. I would like to have an opportunity to call the court's attention to this order and features of it in connection with the opening statement which I made.

This exhibit No. 6, may it please the Court, which is set out *in haec verba* in complainant's complaint is directed to W. C. Ashenfelter; that relates to the question of this agency; these are matters that will have to come up in depositions; with reference to this I will not take time on these points except, except I think the facts are clearly with defendant. That is all and we rest.

I, Mary E. Bell, hereby certify that I acted as Official Reporter in the foregoing court and cause, and took down in shorthand all the proceedings therein; that the foregoing is a full, true and correct transcript thereof and of all evidence introduced orally.

MARY E. BELL. [151]

Subscribed and sworn to before me this 2d day of June, 1923.

[Seal]

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck,
Chief Deputy.

Filed June 2, 1923. G. H. Marsh, Clerk. [152]

AND AFTERWARDS, to wit, on the 28th day of June, 1923, there was duly filed in said court, a praecipe for transcript in words and figures as follows, to wit: [153]

In the District Court of the United States for the District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the above Court:

Please prepare and certify for the record on writ of error by the plaintiff herein to the Circuit Court of Appeals of the United States, for the Ninth Circuit, copies of the following:

1. The judgment-roll, entire, including the complaint, the answer, the reply; the findings of fact and conclusions and the judgment.

2. The certificate of Judge Robert S. Bean with testimony attached, certifying the correctness of the said testimony, and its use at the trial.

3. The papers filed and used to procure this writ of error, to wit:

a. Petition in error with proof of service.

b. Order allowing writ of error and fixing bond with proof of service.

c. The bond with proof of service. [154]

d. The assignments of error, with proof of service.

e. Citation in error, with proof of service.

f. Order allowing writ of error, with proof of service.

4. This praecipe with proof of service.

Dated June 28th, 1923.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff.

Service of the within praecipe for transcript of record by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, June 28, 1923.

WM. S. NASH,
Of Attorneys for Defendant.

Filed June 28, 1923. G. H. Marsh, Clerk. [155]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 6 to 155, inclusive, constitute the transcript of record upon said writ of error in the case in said Court in which Owen M. Bruner Company, a corporation, is plaintiff and plaintiff in error, and O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, is defendant and defendant in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error, and it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the said transcript is \$42.45, and that the same has been paid by said plaintiff in error.

I return, with the said transcript of record attached thereto, the original writ of error and the original citation filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 24th day of July, 1923.

[Seal]

G. H. MARSH,
Clerk. [156]

[Endorsed]: No. 4062. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, a Corporation, Plaintiff in Error, vs. O. R. Menefee Lumber Company, a Corporation, Now Known as Allen-Murphy Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed July 26, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY

vs.

O. R. MENELEE LUMBER CO., Now Known as
ALLEN-MURPHY CO.

**Order Extending Time to and Including July 31,
1923, to File Record and Docket Cause.**

June 29, 1923.

Now, at this day, for good cause shown, IT IS
ORDERED that the time for filing the transcript
of record in this cause and docketing the same in
the United States Circuit Court of Appeals for the
Ninth Circuit, be, and the same is hereby, extended
to and including July 31, 1923.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 4062. United States Circuit
Court of Appeals for the Ninth Circuit. Filed
Jul. 26, 1923. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation,
Now Known as ALLEN MURPHY
COMPANY, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court
of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

NASH, GRAHAM & MARSCH,
Attorneys for Defendant in Error.

No. 4062.

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Defendant in Error.

Brief of Plaintiff in Error.

Upon Writ of Error to the United States District
Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

NASH, GRAHAM & MARSCH,
Attorneys for Defendant in Error.

Statement.

Plaintiff in error—(plaintiff below, called plaintiff herein) sued defendant in error—(defendant below, called defendant herein) upon an alleged

contract for the sale of twenty-five carloads of Douglas fir lumber, at stipulated prices within New York territory, and different prices within Philadelphia territory.

The complaint alleged:

1. The incorporation of the plaintiff under the laws of New Jersey.

2. The incorporation of the defendant under the laws of Oregon.

3. Diversity of citizenship, and "the amount involved in this cause being above the sum of \$3,000.-00."

4. The making of the contract, and the giving of an order based thereon.

5. Plaintiff's reliance upon said agreement, and incurring great expense and costs in advertising the stock of lumber for sale to its clients.

6. On December 13th and 29th, 1919, plaintiff gave shipping instructions to defendant for delivery of two carloads of lumber, approximating twenty-eight thousand feet each, under the contract.

7. On December 19, 1919, defendant advised plaintiff that it had canceled the order for twenty-five cars of lumber, that it would not ship the car asked for under plaintiff's order of December 13th, 1919.

8. Thereafter, plaintiff made numerous demands of defendant for shipment of lumber under its agreements, which defendant refused.

9. The average car of Douglas fir lumber consists of twenty-five thousand feet.

10. When defendant refused to fulfil its contract with plaintiff, the lumber described in the complaint, with New York freight rates, advanced to \$16.35 per thousand more than the sale price.

11. Plaintiff prays judgment for \$10,218.75.

The Answer.

Defendant answered, admitting Paragraphs 1 and 2 of the complaint; denying Paragraphs 3, 4, 5, 6, and 8, 9, 10 and 11 thereof.

Answering Paragraph 7 of the complaint (which alleged the refusal of defendant to fill plaintiff's orders), defendant denied said paragraph, and stated that on December 2, 1919, immediately upon the receipt by it of the alleged order, *it notified one W. C. Ashenfelter that said alleged order could not and would not be accepted as given*, and that the only way it could handle said order was as an order for random widths and lengths; that in answer to said letter of December 2d, Ashenfelter advised defendant that plaintiff could not place said order for random widths and lengths; that thereupon, and under date of December 18th, 1919, defendant wired Ashenfelter refusing said order, and in the same mail returned said order — “and as this defendant is informed and believes, and therefore says, said Ashenfelter communicated all of said letters and wires to this plaintiff.”

Defendant alleged, as a

First Separate Answer and Defense.

1. Plaintiff's incorporation.
2. Defendant's incorporation.
3. That Ashenfelter was its resident lumber broker at Philadelphia;

On November 14, 1919, defendant received an inquiry from Ashenfelter for prices on cars No. 1 common Douglas fir rough (specifying sizes), to be shipped to the order of the plaintiff herein;

The said inquiry was for prices upon lumber to be shipped in any of the sizes or lengths therein specified at the option of the defendant;

Thereupon, defendant wired prices as requested;

On December 2, 1919, defendant received from plaintiff a writing, which purported to be an order for twenty-five cars (specifying sizes of lumber), at the prices defendant had quoted to Ashenfelter;

“That said purported order provided that said material should be shipped in sizes and lengths as wanted by the plaintiff, and should be shipped when wanted by this plaintiff”;

Upon receipt of said purported order, defendant immediately notified Ashenfelter that such order was not in accordance with the inquiry nor the notation made by defendant to Ashenfelter, but, contrary to said inquiry and quotation, the said order provided for shipments—buyer’s option instead of seller’s option;

The defendant notified Ashenfelter that defendant could not accept said order as received by defendant from plaintiff, but could only handle the same in random widths and lengths as per inquiry and quotation;

About December 18, 1919, defendant received from plaintiff instructions to ship approximately twenty-eight thousand feet No. 1 common Douglas fir rough, to be applied on said alleged order;

“That said order specified the number of pieces of each size to be shipped, and likewise specified the lengths thereof”;

None of the material so requested to be shipped was less than twenty feet in length, nor more than thirty-six feet in length;

Said request to ship was not in accordance with the inquiry and quotation above-mentioned;

On December 18, 1919, defendant notified Ashenfelter that said order would not be accepted, and returned it to Ashenfelter “for the reasons above set forth.”

4. Defendant is informed and believes, and says that Ashenfelter communicated such correspondence to plaintiff, who had full notice and knowledge thereof—“and this defendant further says on information and belief that said Ashenfelter in said transaction, without the knowledge, consent or acquiescence of this defendant, was the agent of and represented said plaintiff.”

Second Affirmative Defense.

This defense sets forth a counterclaim for \$551.32, which plaintiff owes defendant.

This counterclaim is admitted.

The Reply.

The reply placed in issue the controverted facts of the first defense.

By stipulation in writing the parties waived a jury, and agreed to try the case before the Court (Transcript, pages 23, 24).

Thereafter, by stipulation all the pleadings were amended to properly describe the corporation defendant (Transcript, page 25).

Findings of Fact and Conclusions of Law.

The cause was tried to the Court, without a jury, the Court rendering Findings of Fact, as follows: (Transcript, pages 26, 27):

I. That the parties hereto are corporations.

II. That the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III. That the alleged order is unilateral and wanting in mutuality.

IV. The parties stipulated the correctness of the counterclaim, etc.

Conclusions of Law.

The Court concluded (Transcript, page 27):

“That the defendant is entitled to a judgment dismissing plaintiff's complaint with costs, and for a judgment against the plaintiff on defendant's counterclaim, in the admitted sum of \$551.32, with interest thereon at six per cent per annum from January 31, 1921, until paid.”

Judgment.

The judgment was entered accordingly, dismissing plaintiff's complaint, with prejudice, and awarding defendant an affirmative judgment on its counterclaim, and for costs. (Transcript, pages 28, 29.)

The judgment was entered December 4th, 1922, and the writ of error was not sued out until June 2d, 1923.

Assignment of Errors.

Plaintiff relies upon the following assignments of errors for reversal: The Court erred,

I.

In finding "That the plaintiff has failed to sustain the averments of its complaint," and in thereafter retaining jurisdiction of the case and deciding said case upon its merits.

II.

In its special finding of fact that the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III.

In its finding of fact number III, to wit:

"That the alleged order is unilateral and wanting in mutuality."

IV.

The Court erred in rendering the judgment against this plaintiff and considering the case on its merits after this finding, to wit:

"That plaintiff has failed to sustain the averments of its complaint."

Upon this pleading the plaintiff relies upon the following points and authorities:

Point I.

The Court found against the plaintiff's allegations

of jurisdictional amount in controversy and thereby divested itself of power to decide the merits of the case.

Judicial Code, Sec. 37.

Gilbert vs. David, 235 U. S. 561.

Oregon has changed her former practice and now requires "all defenses"—including pleas in abatement in actions at law to be joined in one answer:

Or. Laws 1920, Sec. 74.

and the issue of the amount in controversy is tendered by denial.

Gilbert vs. David, 235 U. S. 561.

Cent. Grain & Stock Ex. vs. Board of Trade
(7th C. C. A.), 125 Fed. 466.

Point II.

The sufficiency of the pleadings is properly raised for the first time in the appellate court.

Ky. Life Ins. Co. vs. Hamilton.

63 Fed. 99 (6th C. C. A.).

Pontiac vs. Talbot Paving Co.

94 Fed. 67.

Mound Coal Co. vs. Jeffy Mfg. Co.

233 Fed. 916.

Bausman vs. Blunt, 147 U. S. 652.

(Local law decisive), 37 Law Ed. 318.

3 C. J. 878—Sec. 776.

Or. Laws, Sec. 72.

Stanchfield Co. vs. Cent. Ry. of Oregon,

67 Or. 396.

Point III.

The question whether special findings conform to the pleadings is always in the record and arises without a bill of exceptions.

3 C. J., p. 878, Sec. 776.

Booth vs. F. & T. N. Bank,

47 Or. 299.

Maule vs. Schaut,

41 Or. 425.

Retzer vs. Wood,

109 U. S. 185; 27 L. 900.

Shore vs. U. S. 282 F. 857-859 (Points 3 and 4).

Juanto vs. Wright (Or.), 187 P. 1036.

Point IV.

Special findings are self-excepting and may be reviewed without a bill of exceptions.

St. Joseph Stockyards vs. U. S.,

187 Fed. 104 (105).

St. Louis vs. Wiggin,

11 Wall. 428; 20 L. 192.

Webb vs. National Bank,

146 Fed. 719.

Norris vs. Jackson, 9 Wall. 125, 76 U. S. 125;

19 L. Ed 608.

Metcalf vs. Waterton, 68 Fed. 859 at 864.

Sec. 700 R. S. U. S. C. R. & I. P. vs. Barnett,

169 Fed. 241.

Point V.

Defendant cannot prove a defense different from that alleged or from his admissions in the answer.

Holland vs. Rhodes, 56 Or. 206.

Knahtla vs. O. S. L., 21 Or. 136.

Point VI.

Secret or private instructions to an agent, however binding they may be as between principal and agent, can have no effect on a third person who

deals with the agent in ignorance of the instructions and a reliance on the apparent authority with which the principal has clothed him.

31 Cyc. 1327.

As to third persons such secret instructions are no restriction upon the apparent authority of a general agent for persons dealing with an agent are, in the absence of special proof to the contrary, presumed to know only of his general authority.

31 Cyc. 1328.

And a special agent who acts within his apparent power, will bind his principal, although he has received private instructions which limit his special authority.

31 Cyc. 1329.

31 Cyc. 1331 to 1335.

And if the principal has clothed an agent with *apparent* power to sell personal property, or has held out the agent publicly as having such power of sale, the principal will be bound.

31 Cyc. 1349.

(a) Corporations are bound by acts of their agents within the scope or apparent scope of the agent's authority.

Sherman, Clay & Co. vs. Buffum & Pendleton,
91 Or. 352.

Neppach vs. Ore. & C. R. R. Co. 46 Or. 391.

West vs. Washington Ry. Co., 49 Or. 436.

Dillard vs. Olalla Mining Co., 52 Or. 132.

(b) Acts of an agent though not communicated to his principal, are binding upon the principal if

within the scope or apparent scope of the agent's authority.

Dillard vs. Olalla Mining Co., 52 Or. 126 (132).

Saratoga Inv. Co. vs. Kern, 76 Ore. 243 (253).

(Cases collated.)

Wood vs. Rayburn, 18 Ore. 1.

(c) One dealing with an agent may, lacking contrary knowledge assume that the agent is a general agent of his principal.

Hillyard vs. Hewitt, 61 Or. 58.

Rae vs. Heilig Theater, 94 Or. 408.

Aerne vs. Gostlow, 60 Or. 113.

Point VII.

The order involved (transcript pages 8 and 9) was signed,

“OWEN M. BRUNER COMPANY,

W. C. Ashenfelter,

Agt. for O. R. Menefee Co.”

These signatures show a bilateral, mutual contract sufficient to bind the parties.

Hensen vs. Boyd, 161 U. S. 397; Bk. 40 L. 746.

Bibb vs. Allen, 37 L. 824 (825).

Clews & Jamieson, 182 U. S. 491, 45 L. 1183.

White vs. Houston, 200 Fed. 390 (8 C. C. A.).

Thorne vs. Brown, 257 Fed. 519-525.

(Construes U. S. Statute on Cotton Futures);

(Certiorari denied by U. S. Supreme Court, in effect, an affirmance.)

Argument.

The Court will observe that no bill of exceptions appears in the record. The plaintiff in error is

therefore limited to such defects, if any, as appear upon the face of the judgment-roll consisting of its various papers, to wit, the pleadings, the findings and conclusions, and the judgment.

Predicated upon this record, thereore, the plaintiff argues:

Point I of Argument.

The Court found against the allegations in the complaint stating the amount in controversy, but, nevertheless, retained jurisdiction to determine the cause on its merits.

The pleadings admit the diverse citizenship of the corporations plaintiff and defendant.

Paragraph III of the complaint says (Transcript, page 7):

“III.

“That the grounds upon which the Court’s jurisdiction depends in this case are the diversity of citizenship existing between plaintiff and defendant herein, and the amount involved in this case being above the sum of \$3,000.00.”

The answer (Transcript, page 14) denies Paragraph III and other paragraphs of the complaint.

The question of jurisdictional amount in controversy was therefore made an issue.

The Court finds (Transcript, page 26):

“I.

“That the parties hereto are corporations.

“II.

“That the plaintiff has failed to sustain the averments of its complaint, and in particular

has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in the complaint."

The finding by the Court—"That the plaintiff has failed to sustain the averments of its complaint"—is a direct finding, either general or special, against the allegation of jurisdictional amount in controversy.

When the Court found this fact, he should have dismissed the case, without deciding it upon its merits.

Judicial Code, Section 37, says:

"If in any suit commenced in the District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of said District Court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court * * * the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require and shall make such order as to costs as shall be just."

Like provision existed in the Act of March 3d, 1875.

Central Grain & Stock Exchange vs. Board of Trade (7th C. C. A.), 125 Fed. 466, says:

“In every case the question with which a federal court is first confronted is that of its jurisdiction, both over the subject matter and of the party; and this jurisdiction must affirmatively appear upon the record. So far has this doctrine been carried that judgments have been frequently reversed upon appeal because the records did not disclose the essential jurisdictional facts. *Railway Company vs. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Hancock vs. Holbrook*, 112, U. S. 229, 5 Sup. Ct. 115, 28 L. ed. 714; *Ayers vs. Watson*, 113 U. S. 594, 598, 5 Sup. Ct. 641, 28 L. ed. 1093; *Insurance Company vs. Rhoades*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *Metcalf vs. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. ed. 543; *Railroad Company vs. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. ed. 672. These cases are to the effect that it is absolutely essential that the jurisdictional facts appear by the record; that it is error to proceed unless the jurisdiction of the court be so shown; that the absence of jurisdictional facts cannot be waived; that the failure of the record to disclose such facts should be noticed by the court *sua sponte*, and may be assigned for error by the party at whose instance the error was committed.”

See also *Gilbert vs. David*, 235 U. S. 561, 35 Sup. Ct. Rep. 165.

We respectfully urge, therefore, that the judgment-roll itself shows want of jurisdiction to de-

termine the merits of the cause other than sufficient inquiry by the lower court upon which it based its finding quoted above.

Point II of Argument.

Though no bill of exceptions is found in the record, yet the findings of the Court are special, and as such are self-excepting.

Where the findings of the Court are special, their sufficiency for any matters appearing on the record is one of law for the Court, and no exception need be taken or preserved in a bill to challenge either the sufficiency of the evidence to support the special findings, or that the special findings are at variance with the pleadings, or that they do not support the judgment.

(a) The question whether the special findings conform to the pleadings is always in the record, and arises without a bill of exceptions.

Norris vs. Jackson, 9 Wall. 125, 76 U. S. 125, 19 L. 608, says:

“In the case of a special verdict, the question is presented as it would be if tried by the jury, whether the facts thus found require a judgment for plaintiff or defendant; *and this being a matter of law, the ruling of the Court on it can be reviewed in this Court on that record.*”

St. Joseph Stockyards Company vs. U. S. (8th C. C. A.), 187 Fed. 104, says:

“Counsel for the United States contends that the question whether or not the special findings sustain the judgments cannot be considered

in this court, under *Rogers vs. United States*, 141 U. S. 548, 12 Sup. Ct. 91, 35 L. ed. 853, and *United States vs. Cleage*, 88 C. C. A. 249, 161 Fed. 85, because these cases were tried in the District Court. But he is mistaken. They were commenced, were tried, and the judgments were rendered in the Circuit Court, and in such a case the special finding, like a special verdict, becomes a part of the record, and the question of its sufficiency to sustain the judgment arises, without contemporaneous objection or exception, in the absence of a bill of exceptions to present them. *St. Louis vs. Ferry Company*, 78 U. S. 423, 428, 20 L. ed. 192; *Norris vs. Jackson*, 76 U. S. 125, 128, 19 L. ed. 608."

Webb vs. National Bank (8th C. C. A.), 146 Fed. 717, at page 719, says:

"No objection or exception is required, however, to present to an appellate court the question whether or not the facts found sustain the judgment, because like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record. *St. Louis vs. The Ferry Company*, 78 U. S. 423, 428, 20 L. Ed. 192; *Tyng vs. Grinnell*, 92 U. S. 467, 469, 23 L. Ed. 733; *Aetna Ins. Co. vs. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395; *Allen vs. St. Louis National Bank*, 120 U. S. 20, 30, 7 Sup. Ct. 460, 30 L. Ed. 573; *Seeberger vs. Schlesinger*, 152 U. S. 581, 586, 14 Sup. Ct. 729, 38 L. Ed. 560; *Hooven*,

Owens & Rentschler Co. vs. John Featherstone's Sons, 49 C. C. A. 229, 234, 111 Fed. 81, 86."

See additional authorities, Points III and IV this brief.

In addition, it is too well settled to need argument that the sufficiency of the pleadings is properly presentable for the first time in the appellate court. This is a point of practice which is governed by local laws.

See Bausman vs. Blunt, 147 U. S. 652, 37 L. Ed. 318.

Stanchfield Company vs. Central Railway of Oregon, 67 Or. 396, says:

"Plaintiff by pleading over after a demurrer to the answer was overruled, did not waive the objection that the answer did not state facts sufficient to constitute a defense, and such objection could be raised at any time during the trial or on appeal."

Mound Coal Company vs. Jeffrey Mfg. Company (4th C. C. A.), 233 Fed. 913, says:

"Though defendant pleaded over after the overruling of its demurrer to the declaration, went to trial, and failed to renew the demurrer, and asked for verdict under all the evidence at the close of the case, the sufficiency of the declaration to state a cause of action may be reviewed as an unassigned error appearing on the record."

See additional authorities under Point II this brief.

Plaintiff therefore urges that the special findings made by the Court are not in conformity with, but vary from the allegations of the pleadings.

The special findings of the Court are these: (Transcript, pages 26, 27.)

“II.

“That the plaintiff has failed to sustain the averments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff’s complaint.

“III.

“That the alleged order is unilateral and wanting in mutuality.”

ASHENFELTER’S AUTHORITY.

The basis of special finding II rests in the finding by the Court that the plaintiff had not shown Ashenfelter’s authority to accept the order set forth in the complaint, appearing at pages 8 and 9 of the transcript.

That order *apparently* is signed as follows:

“OWEN M. BRUNER CO.

W. C. Ashenfelter,

Agt. for O. R. Menefee Co.”

The order does not purport to be signed by Ashenfelter as special agent, but by Ashenfelter as agent of the O. R. Menefee Company.

The complaint makes no allegation of Ashenfelter’s authority. It is founded upon Ashenfelter’s *apparent* authority.

The record shows that the transaction under consideration relates to the sale of *personal property*; that the transaction was closed in Philadelphia, Pennsylvania; that Owen M. Bruner Company is in Philadelphia, Pennsylvania; and that Ashenfelter, agent of O. R. Menefee Company, was at Philadelphia.

So far as the complaint shows, therefore, the transaction was between plaintiff and *an unlimited agent of the defendant acting within the scope of his authority*.

The answer (Transcript, page 14) denies paragraph IV of the complaint, but it makes no specific allegation of new matter on said paragraph.

The answer of denials (Transcript, pages 14, 15) shows that the defendant did not notify Ashenfelter that it could not accept this order until after December 2d, 1919, whereas the order was given November 25th, 1919 (Transcript, page 8).

The affirmative answer (Transcript, pages 15 to 18) alleges at paragraph III (Transcript, pages 16, 17) many details of the transaction, and by compiling the data set forth at paragraph III of the affirmative answer with the data in plaintiff's complaint, the chronology of events involving this case appears thus:

(a) On November 14, 1919, defendant received an inquiry from Ashenfelter for several cars of specified lumber. (Answer, Transcript, page 16.)

(b) Such inquiry was for prices on delivery in quantities at defendant's option. (Answer, Transcript, page 16.)

(c) Thereupon, defendant telegraphed prices on said material as requested. (Answer, Transcript, page 16.)

(d) Thereafter, about December 2d, 1919, the defendant received from plaintiff the order for twenty-five cars, etc. (Answer, Transcript, page 16.)

(e) The said order is set out at length in the complaint. (Complaint, Transcript, pages 8, 9.)

(f) Immediately upon receipt of said purported order, defendant notified Ashenfelter that the order was not in accordance with the inquiry of Ashenfelter, nor with the quotations, but, on the contrary, provided for a transaction at *buyer's* option instead of *seller's* option as to time and quantity of delivery. (Answer, Transcript, pages 16, 17.)

(g) On December 18, 1919, defendant received plaintiff's shipping instructions for twenty-eight thousand feet No. 1 common Douglas fir rough, to be applied upon said alleged order; said order specified the number of pieces, sizes, and lengths, etc. Said request was for shipment at *buyer's* option, not *seller's* option, and violated the quotations which defendant made Ashenfelter. (Answer, Transcript, page 17.)

(h) On December 18, 1919, defendant notified Ashenfelter that the order would not be accepted, and returned said order to Ashenfelter for the above reasons. (Answer, Transcript, page 17.)

The answer at paragraph IV says: (Transcript, page 18.)

“IV.

“That this defendant is informed and believes and therefore says that said Ashenfelter com-

municated all of said correspondence between him and this defendant with reference to said order to the plaintiff who had full notice and knowledge thereof, and this defendant further says on information and belief that said Ashenfelter in said transaction without the knowledge, consent or acquiescence of this defendant was the agent of and represented said plaintiff.”

The answer fails to allege plaintiff’s knowledge of Ashenfelter’s limitation or secret instructions until after the contract was made.

The admitted facts show that these negotiations began November 14th, 1919 (Answer, Transcript, page 16) and the order, set forth in the complaint, is dated November 25th, 1919.

The attempted cancellation of such order was not until December 18th, 1919. (Answer, Transcript, page 17.)

The order itself (Transcript, pages 8, 9) says:

“This order covers order given you over ’phone on November 21st, and bears correction as per your letter of the 22d inst.”

The pleadings therefore show that negotiations began by communication dated November 14th, 1919; they were continued by telegram from defendant to Ashenfelter; and on November 21st, 1919, the plaintiff and Ashenfelter had negotiations which were corrected as per Ashenfelter’s letter of November 22d, 1919, and resulted in the order of November 25th, 1919.

The answer does not allege that Ashenfelter was a *limited agent* of the defendant, nor does it allege that the defendant ever notified plaintiff that Ashenfelter's authority was limited, nor did defendant notify the plaintiff, *except through Ashenfelter*, of any claim of variance between the order and the agreement.

No notice to plaintiff of any question concerning the validity of the order was made or raised until December 18th, 1919, — almost one month after the order was given, although the order tells the defendant, through its agent Ashenfelter (Transcript, page 8),

“We shall immediately begin a campaign for orders, and will send same to you as soon as we book the business.”

The plaintiff therefore urges that the answer does not set up the defense of a known want of authority, because it does not show:

(a) That Ashenfelter was an agent with limited authority;

(b) That no notice of the limitation of power was given to plaintiff before the transaction;

(c) That plaintiff received any such notice until a month after the order was given;

(d) That Ashenfelter was not a general agent for the sale of personal property.

On the other hand, the answer alleges:

(a) That Ashenfelter was a resident of Philadelphia, “and represented this defendant as a lumber broker, and not otherwise”;

(b) That plaintiff dealt with Ashenfelter as the agent of the defendant;

(c) That no notice of any claim of limitation of Ashenfelter's power was given plaintiff until about December 18th, 1919;

(d) That meanwhile, plaintiff had changed its relations based upon the contract with defendant, as shown in the written notice contained in the order. (Transcript, pages 8, 9.)

Plaintiff asserts, therefore, that the finding of the Court is at variance with the facts shown by the pleadings, because the Court found:

First. (Transcript, pages 26, 27) That plaintiff failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in the plaintiff's complaint; and

Second. (Transcript, page 27) That the order is unilateral and wanting in mutuality.

Plaintiff urges that the answer sets forth only secret, undisclosed and unknown instructions between the principal and his agent; that the whole record shows that plaintiff dealt without knowledge thereof, and purchased personal property without any knowledge of the limitation of the power of the agent with whom he dealt.

It is plaintiff's contention that the court made its findings on a defense not pleaded, and that the special findings vary from the defense as pleaded. This we submit cannot be done.

Holland vs. Rhodes, 56 Or. 206.

Knahtla vs. O. S. L., 21 Or. 136.

Aerne vs. Gostlow, 60 Or. 113 says:—

The question is not so much what actual authority Krull possessed as what authority he *apparently* possessed; and persons dealing with the corporation were not bound to search its records and ascertain what limitations this placed upon his power to act, if it permitted him to hold himself out as an agent in charge of its bonding business.”

And again in 60 Or. at 121, the court says:—

“Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general.”

Metheun Co. vs. Hayes, 33 Me. 169.

Austrian & Co. vs. Springer, 94 Mich. 343 (54 N. W. 50; 34 Am. St. Rep. 350).

See also, 31 Cyc. 1328, 1329, 1331 to 1335.

Corporations are bound by the acts of their agents within the scope or apparent scope of the agent's authority.

Sherman, Clay & Co. vs. Buffum & Pendleton, 91 Or. 352.

Neppach vs. Ore. & C. R. R. Co., 46 Or. 391.

West vs. Wash. Ry Co., 49 Or. 436.

Dillard vs. Olalla Mining Co., 52 Or. 132.

Under these authorities, the instructions from Menefee to Ashenfelter as alleged in the answer are secret instructions, because it is not alleged that they were communicated to plaintiff before the transaction was closed, and because further Ashenfelter apparently had the authority to make the contract set forth in the pleadings.

The answer alleges that the defendant received the order on December 2d, 1919, and immediately notified Ashenfelter, etc. (abstract 16, 17), but it does not say when Ashenfelter notified Bruner, except that at page 18, paragraph 4 it makes an allegation that Ashenfelter communicated the correspondence to the plaintiff, but does not give any date, therefore, it does not charge the plaintiff with dealing with a limited agent, or with knowledge of the instructions which Menefee gave Ashenfelter until, in fact, the transaction was closed.

It is also well settled that the acts of an agent, though not communicated to his principal, are binding upon the principal if within the scope or apparent scope of the agent's authority, and that notice to such agent within the apparent scope of his authority is notice to the principal.

Dillard vs. Olalla Mining Co., 52 Or. 126 at 132.

Saratoga Inv. Co. vs. Kern, 76 Or. 244 (Point 4) and authorities at page 253.

The notice which Bruner gave Ashenfelter in the order set out in the complaint (transcript 8, 9) is this:—

“We shall immediately begin a campaign for orders, and will send same to you as soon as we book the business.

“This order covers orders given you over phone on November 21st, and bears correction as per your letter of the 22d inst.”

This order is the one which defendant admits it received on December 2d. The pleadings, therefore, show negotiations as heretofore set forth, and that on November 21st and 22d dealings were had

between plaintiff and Ashenfelter, as agent for defendant, whereby the agent was notified that plaintiff was changing his relation in incurring new contracts based upon the fulfillment of the order which Ashenfelter, as agent, accepted.

And, the answer contains no allegation that the defendant ever notified plaintiff directly of any claimed limitation of authority of Ashenfelter or of any difference or variance between the order and the contract, therefore, we say that finding of fact number two is contrary to the pleadings, and is a finding upon an issue which is not tendered.

Mutuality of Contract.

The Court found (transcript page 271, III) that the alleged order is unilateral, and wanting in mutuality.

As above pointed out, the order is signed by Owen M. Bruner Company, and is signed by the Menefee Lumber Company, by its agent, whom it asserts in its answer is its resident lumber broker at Philadelphia.

The order is specific as to quantities and qualities of lumber, the price to be paid, and as to freight rates.

The defendant says the agreement was for sale at seller's option, and that the order is at buyer's option, but this does not show that the order was unilateral, nor does it show lack of mutuality, as both parties signed the order.

It does show that Ashenfelter did not take the order as per instructions from his principal.

The question, therefore, reverts to that already discussed, and we submit we have shown that plaintiff was justified in relying upon Ashenfelter's authority or apparent authority, for the reasons heretofore argued.

The order is not assailed because of indefiniteness in its terms, or indefiniteness in the amount or price to be paid, or time of shipment, nor for insufficiency in form or substance.

It is assailed solely upon the ground that Ashenfelter disobeyed the secret instructions of his principal; therefore, we respectfully urge that the lower Court erred in finding that the order lacked mutuality and was unilateral.

The order is signed by the parties who are to be charged thereby, and hence is neither unilateral nor lacking in mutuality on its face.

Hansen vs. Boyd, 161 U. S. 397; Bk. 40 L. 746.

Bibb vs. Allen, 37 L. 824 (825).

Clews & Jamieson, 182 U. S. 491; 45 L. 1183.

White vs. Houston, 200 Fed. 390 (8 C. C. A.).

Thorne vs. Brown, 257 Fed. 519-525 (Construes U. S. Statute on Cotton Futures). (Certiorari denied by U. S. Supreme Court, in effect, in affirmance.)

From the condition of the pleadings, plaintiff respectfully submits that the finding that the alleged order is unilateral and wanting in mutuality, as well as the finding that Ashenfelter's authority is unproven are both on issues not properly presented by the pleadings, and hence the findings are not supported by the allegations of the answer.

We believe that we have shown:—

(1) That the court was without jurisdiction to pass upon the merits of the case after finding against plaintiff on the allegation of the amount in controversy;

(2) That the special findings are self-excepting, and are assailable for variance with the pleadings, and as being upon matters not in issue; and

(3) That the special findings are contrary to the conditions shown by the pleadings because no charge is made in the answer that the plaintiff had any knowledge of any alleged limitation upon Ashenfelter's power, or knew of any secret instructions from Menefee to Ashenfelter until long after the giving of the order set out in the complaint.

For the foregoing reasons, we submit that the judgment on the merits should be reversed, and that if plaintiff is conclusively bound by the finding, to wit: "That plaintiff has failed to sustain the averments of its complaint," then the defendant likewise is conclusively bound by such finding, and the lower court should have dismissed the case upon that finding *sua sponte* without considering the merits of the case.

Very respectfully,

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

No. 4062.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation,
Now Known as ALLEN MURPHY
COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District
Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

WM. S. NASH and S. J. GRAHAM,
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BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District
Court of the District of Oregon.

The plaintiff in error relies upon four Assignments of Error for a reversal of the judgment of the District Court. Assignments 1 and 4 relate to the jurisdiction of the court. Assignments 2 and 3 relate to the finding that there was a failure to prove agency and to the finding that the contract set out in the complaint was unilateral and lacking in mutuality.

No exception was reserved to any ruling of the court. No request was made for a declaration of law, for findings either general or special, and no objection or exception tendered or saved to the findings signed by the court. No bill of exceptions was served or filed and at the threshold of this case the question arises whether or not there is any question for this court to review.

The brief of the plaintiff is predicated upon the assumption that the findings are special findings. We submit that this assumption is unwarranted. Can any finding be more general than a finding that the plaintiff has failed to sustain the averments of its complaint coupled with the finding that the parties in open court stipulated that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated?

In the case of *British Queen Mining Company vs. Baker Silver Mining Company*, 139 U. S. 222, Mr. Chief Justice Fuller said that the finding in a case tried to a court without a jury must be either general or special. It cannot be both.

We submit that under a fair construction the findings in this case are nothing more nor less than general findings in favor of the defendant, and if considered as general findings, the findings relating to agency and the lack of mutuality may be disregarded. If our construction is right and the findings are nothing more nor less than general findings, then

clearly under the state of the record there is nothing for this court to review. Numerous decisions of this court settle that point, the latest expression of this court being found in the case of Warren et al vs. Bromley, 288 Fed. Rep. 563.

Assuming, however, that the findings are special findings, in the state of the record it is exceedingly doubtful if any question is presented for review.

In H. F. Dangberg Land & Livestock Company vs. Day, 247 Fed. Rep. 477, at page 478 this court said:

“A jury trial was waived and the court below made special findings of fact in favor of the defendants on the material issues of the case. One of the findings was that on or about March 25, 1913, the Highland Cattle Company, through its duly authorized agent, entered into a contract with the defendants in error which was the written contract which had been deposited in escrow and that no other contract was made. At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues, and by no motion or request did it present to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant. The sufficiency of the evidence to support the findings, therefore, is not open to review in this court. Citing cases. There remains only the question whether there was error in the admission or exclusion of testimony.”

It is apparent that a bill of exceptions brought up the evidence in the case from which we have just

quoted. In the instant case there is no bill of exceptions, no request for either general or special findings, declaration of law, objections or exceptions to special findings, or any exception whatsoever.

To the same effect is the decision of this court in *Pederson et al vs. United States for the use of Washington Iron Works et al*, 253 Fed. Rep. 622. At page 625 the court says:

“From the foregoing history of the case it is apparent the trial of the issues having been to the court without a jury and no request having been made of the trial court for a ruling that there was no substantial evidence to justify a judgment, the findings upon questions of fact should be accepted by this court, and therefore, the only rulings for review are those made upon matters of law properly presented by a bill of exceptions.”

In the case of *Hennig vs. Richey*, 196 Fed. Rep. 779, the Circuit Court of Appeals for the Eighth Circuit, in a case tried to the court without a jury, held that findings made by a Circuit Court in an action at law cannot be reviewed by the appellate court in the absence of exceptions or a request for other findings. It would, therefore, seem that even if the findings are to be deemed special findings, in the absence of any request by the plaintiff in error for declarations of law or special findings or objections thereto, no question is presented for review.

Waiving, however, for the time the question whether or not the record presents any question for review, the assignments of error are without merit. As heretofore stated, Assignments 1 and 4 relate to the jurisdiction of the District Court, and Assignments 2 and 3 to the findings concerning agency and the lack of mutuality in the contract.

On the Question of Jurisdiction.

We will discuss first the Assignments of Error going to the jurisdiction of the court and submit,

1. United States courts, although possessing only such jurisdiction as may be conferred on them by statute, are regarded as courts of general jurisdiction within the rule that jurisdiction will be presumed.

15 Corpus Juris, page 836, and authorities cited.

2. The question of jurisdiction is determined from the whole record which shows jurisdiction as diversity of citizenship is admitted and the pleadings affirmatively show that the amount in controversy exceeded the sum of \$3000.00.

O'Reilly vs. Campbell et al, 116 U. S. 418, 420, 421.

Barry vs. Edmunds, 116 U. S. 550.

Hartog vs. Memory, 116 U. S. 588, 592.

Brent vs. Charles H. Lilly Company, 202 Fed. Rep. 535.

3. Findings are not to be construed with the strictness of special pleadings.

O'Reilly vs. Campbell et al, 116 U. S. 418, 421.

4. Jurisdiction may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record.

Howe vs. Howe & Owen Ball Bearing Co. et al (8 C. C. A.) 154 Fed. 820, 822.

Waite vs. Santa Cruz, 184 U. S. 302, 327.

5. An action may not be dismissed for want of jurisdiction unless the record shows to a legal certainty want of jurisdiction.

Barry vs. Edmunds, 116 U. S. 550.

Hill et al vs. Walker, 167 Fed. 241.

These several points will be discussed together. The complaint has averments showing the diversity of citizenship and that the amount in controversy exceeded the sum of \$3000.00. The answer admitted the diversity of citizenship, but denied the amount in controversy. Upon this state of the pleadings jurisdiction affirmatively appears in the record.

The Supreme Court in the case of O'Reilly vs. Campbell, 116 U. S. 418, at pages 420 and 421, speaking through Mr. Justice Field says:

“Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all taken together with the pleadings we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party and the requisite correction of the findings would seldom be denied.”

So in the instant case the findings taken in connection with the pleadings affirmatively show the jurisdiction of the court to render the judgment complained of. Moreover, it is only when the facts upon the record create a legal certainty of lack of jurisdiction that a suit can properly be dismissed. This is held in the case of *Barry vs. Edmunds*, 116 U. S. 550, and has been repeatedly followed.

In *Brent vs. Charles H. Lilly Company*, District Court, Western District, Washington, 202 Fed. Rep. 535, Cushman, Judge, it is said:

“The defendant in its answer pleaded the general issue, as well as an affirmative defense, in which latter the real nature of the differences of the parties as aforesaid developed by the evidence was disclosed. It is considered that the questions apart, this general denial being in issue, plaintiff’s right to recover would show the jurisdictional amount to be in controversy for by that denial plaintiff’s right to recover anything was disputed.”

In *Howe vs. Howe & Owen Ball Bearing Company et al*, 154 Fed. 820, at page 822, Sanborn, Circuit Judge, says:

“The jurisdiction of a Federal Court may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record.”

These authorities sufficiently show that even taken as special findings the findings are not to be construed with the strictness of a special pleading; that the whole record is to be examined to determine the question of jurisdiction which may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record, and that unless it is made to appear to a legal certainty that the court is without jurisdiction a cause cannot be dismissed.

Section 37 of the Judicial Code, relied upon by the plaintiff in error, is not applicable upon the record made in this case. That section simply authorizes the court when it appears that a suit does not really and substantially involve a controversy properly within the jurisdiction of the court to dismiss it. Here the record affirmatively discloses that the action did involve a controversy within the jurisdiction of the court.

An interesting case interpreting this section of the judicial code is *Hill et al vs. Walker*, 167 Fed. Rep. 241, C. C. A. Eighth Circuit, opinion by Amidon,

District Judge, where it is held that a proper pleading of jurisdictional facts makes a prima facie case in favor of jurisdiction which continues until evidence is produced which convinces the mind to a legal certainty that the court is in fact without lawful cognizance of the suit. No bill of exceptions accompanies this record and can this court say that evidence was produced showing to a legal certainty that the amount in controversy did not exceed the sum of \$3000.00. The very Assignments of Error relied upon by the plaintiff in error set out that the diverse citizenship of the respective parties and the amount in controversy were proved. Transcript of Record, page 34.

The case of Gilbert vs. David, 235 U. S. 561, cited by plaintiff in error, does not support its contention. This was a case in which the court held no more nor less than that where the record in a case dismissed by the District Court for want of jurisdiction on account of the absence of diverse citizenship brings up the testimony, the Supreme Court must consider it and determine whether the trial court rightly decided the question of citizenship.

In this case the record affirmatively shows the jurisdiction of the court and the very fact that the complaint was dismissed with prejudice, and that the court rendered judgment on the counterclaim is a finding of jurisdiction and inconsistent with the contention of the plaintiff that the court was without jurisdiction.

Sufficiency of the Findings.

The remaining Assignments of Error relied upon by the plaintiff in error go to the sufficiency of the finding of special agency and the finding of lack of mutuality in the contract. We have already suggested that these assignments are not available to the plaintiff in error. But passing that question and considering the findings as special findings they are amply sufficient to support the judgment. The finding that the plaintiff has failed to sustain the averments of its complaint coupled with the finding that the parties in open court stipulated that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated, are sufficient to sustain the judgment without resort to the finding that the alleged agent was without authority and that the contract was lacking in mutuality.

Moreover, the objection of the plaintiff to the finding relating to agency is not well taken. The sufficiency of the evidence to support this finding is not before the court on the instant record.

The argument of the plaintiff is based upon the assumption first that the answer alleges that plaintiff dealt with Ashenfelter as the agent of the defendant, and secondly, that no notice of any claim of limitation of Ashenfelter's power was given plaintiff until about December 18, 1919. Brief of Plaintiff, in Error,

page 23. Upon these assumptions the plaintiff argues that the answer sets forth only secret undisclosed instructions between a principal and agent, and that the record shows that the plaintiff dealt without knowledge thereof and purchased personal property without any knowledge of the limitation of the power of the agent with whom he dealt.

As a matter of fact, the answer alleges that Ashenfelter represented this defendant as a lumber broker and not otherwise. Transcript of Record, page 16.

The answer further alleges that all of the correspondence between the defendant in error and Ashenfelter was communicated to the plaintiff in error who had notice and knowledge thereof, and that in the transaction Ashenfelter was the agent of the plaintiff. Transcript of Record, page 18.

On this state of the pleading it becomes apparent that plaintiff's objection is wholly without foundation. Every presumption is indulged in favor of the sufficiency of a pleading which has not been attacked prior to judgment. If any question existed as to the particular time the correspondence and wires passing between Ashenfelter and this defendant were communicated to the plaintiff it had a remedy in the District Court by a motion to make that portion of the answer more definite and certain. The record will show that it did not resort to such a motion, nor was any objection of any sort or character made to the pleading. In this condition of the record, there-

fore, it is apparent that the objection is wholly lacking in merit.

So much of the brief of plaintiff in error consists of a discussion of the pleadings that it may not be inappropriate to consider an objection to the complaint raised in the trial court. The contract relied upon by the plaintiff in error is set out in *haec verba* in the complaint. See Transcript of Record, pages 8 and 9. We submit that it is well established that the language of the alleged order controls any conclusions of the pleader concerning its effect.

In *Somers vs. Hanson*, 78 Ore. 429, Mr. Chief Justice Moore said:

“When the contract sued upon is set out in *haec verba*, it will be so construed that its legal effect will be recognized. If the writing is thus declared upon, it is superfluous to state what its legal effect is: 4 Ency. Pl. & Pr. 918. If there be any discrepancy between the averments of a pleading and the terms of a writing properly identified or attached to a statement of facts constituting a cause of action or a defense, the language of the exhibit will control in determining its legal effect: 31 Cyc. 563; *Patrick v. Colorado Smelting Co.*, 20 Colo., 268 (38 Pac. 236); *Lewy v. Wilkinson*, 135 La. 105, 64 South, 1003). The promissory note having, in effect, been set forth in the complaint in the exact language employed in the negotiable instrument, the allegation of the legal effect of the writing as stated in the pleading must be disregarded as superfluous and variant.”

To the same effect is the case of *Cranston vs. California Insurance Co.*, 94 Ore. 369, 373.

Accordingly, it appears from the complaint that the contract sued upon is one with Ashenfelter and not one with the defendant.

At 2 Corpus Juris, page 670, it is said:

“A contract by an agent should be in the name of his principal, so as to show beyond question that it is the principal who contracts, and not the agent, since the intention of the parties, as legally evidenced by the terms of the contract itself, is always the governing consideration in determining who is bound by the contract. It is not alone sufficient that the agent has authority to bind the principal, but he must in fact make the contract the obligation of the principal in terms, in order to bind him.”

The case of *Prather v. Ross*, 17 Ind. 495 is cited in support of the text. In this case it is held that in order to bind the principal and make it his contract, the instrument must on its face purport to be the contract of the principal and his name must be inserted in it and signed to it, and not merely the name of the agent, although the latter is described as agent in the instrument.

At 2 Corpus Juris, page 682, it is said:

“Generally the agent and not the principal is personally bound by a contract containing apt words to bind him, if he executes the contract in

his own name and makes the promises and undertakings his own without any suggestion or indication that he is contracting for another, although he recites that he is an agent or the other party knows that he is such."

These quotations from Corpus Juris are quoted with approval in *Cranston vs. California Insurance Co.*, 94 Ore. 369, 374, which holds that a contract taken in the name of an agent does not bind the principal.

Accordingly, without resort to the evidence it appears from plaintiff's complaint that recovery could not be had against this defendant.

On the Question of Mutuality of the Contract.

The alleged order affirmatively discloses that it is unilateral and lacking in mutuality. The order contains this provision:

"To be shipped in sizes and lengths *as wanted*. We shall immediately begin a campaign for orders and will send same to you *as soon as we book the business*." Transcript of Record, page 8.

This left the defendant in error in the position where it could not enforce the order if the price of lumber fell, but on the other hand, under the theory of the plaintiff in error, if the price of lumber rose plaintiff in error could enforce the fulfillment of the order.

At 23 Ruling Case Law, page 1264, discussing the question of mutuality in sales it is said:

“In case of such a contract the only consideration of which on the one side is the offer or agreement to sell, and on the other the offer or agreement to buy, the obligation of the parties to sell and to buy must be mutual to render the contract binding upon either party.”

At page 1265 of the same authority it is said:

“Unless both are so bound that either could maintain an action against the other for a breach, neither will be bound. It follows that if a seller agrees to deliver such quantities of any commodity as a buyer may choose to order, but the buyer does not agree to order any quantity of such commodity, the contract would be wanting in mutuality and void. The buyer not being bound, the seller would be free to disregard the agreement. To hold otherwise would enable the buyer to give orders and take the commodity if prices fall and to give no orders and refuse to take it if prices should rise.”

The Supreme Court of the United States announced the same principle in the case of *Dorsey vs. Packwood*, 12 Howard 126. In that case the court had under consideration a contract whereby the purchaser of a plantation agreed to transfer to his son-in-law one-half of the plantation as soon as the son-in-law should pay for one-half the cost of said property either with his own private means or with one-

half of the profits of the plantation. The court held that the contract was deficient in mutuality.

In *American Cotton Oil Company vs. Kirk*, Circuit Court of Appeals, 7th Circuit, 68 Federal Reporter 791, the court held that a contract to sell and deliver ten thousand barrels of oil at a stipulated price in such quantities per week as the buyer may desire, to be paid for as delivered, but which contains no agreement on the part of the buyer to purchase and receive any particular quantity of oil, is not binding for want of mutuality. In reaching this conclusion reference is made to *Dorsey vs. Packwood*, *supra*.

In the case of *Crane et al vs. C. Crane & Company*, Circuit Court of Appeals, Seventh Circuit, 105 Federal Reporter 869, opinion by Judge Grosscup, the court held that an agreement of a wholesale dealer to supply a retailer during a certain time at stated prices with so much of a commodity as the purchaser might require for his trade, and which left it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices as might be most to his advantage and the corresponding disadvantage of the seller, was void for want of mutuality.

In *T. W. Jenkins & Company vs. Anaheim Sugar Company*, District Court, Southern District of California, 237 Federal Reporter 279, the court held that an agreement of a wholesale grocer to buy all the sugar that it would require during the month of Aug-

ust from the defendant at a fixed price was invalid for want of mutuality, and notwithstanding the rule that a detriment to the promisee will operate as a consideration the agreement by plaintiff to purchase only from defendant was no consideration for plaintiff's business was such that it would not desire or require sugar unless it could be resold at an advance, and, therefore, plaintiff could not be required to purchase any sugar so long as it refrained from purchasing from others than the defendant. The opinion of the court was rendered by Judge Bledsoe. It is a well considered opinion and numerous authorities are cited to sustain his conclusion. Among other authorities he quotes the following language of Judge Grosscup in *Crane vs. Crane*, *supra*:

“Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error and such customers as usually come to a merchant. Should the contract under discussion be upheld the plaintiffs in error would be held to occupy this advantageous situation. If the prices of dock oak lumber rose there would be that much increase in ratio of profits and probably coming into a situation to outbid competitors increase also the quantum of orders; if, on the other hand, prices fell below the range of profits the orders could be wholly discontinued. On the contrary, the situation of

the defendant in error would be this: Should prices fall it could not compel the plaintiffs in error to give further orders; but should prices rise the orders sent in would be compulsory and the loss measured both by the increase of the ratio of profits and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—a situation either to go on or to discontinue as such interest develops.”

In *Interstate Iron & Steel Company vs. Northwestern Bridge and Iron Company*, Circuit Court of Appeals, Seventh Circuit, decided January 3, 1922, 278 Federal Reporter 51, the court reiterated the principles announced by preceding decisions rendered in its circuit, and in support of its conclusion among other cases referred to the decision of the Circuit Court of Appeals of this Circuit in the case of *City of Pocatello vs. Fidelity and Deposit Company of Maryland*, 267 Federal Reporter 181. This was a case in which a city contract provided that if the city for any reason failed to sell bonds due to be sold on a contract date it might terminate the contract. The court in an opinion by Hunt, Circuit Judge, held that a contract of such a nature could not be enforced for the reason that it lacked mutuality.

The finding, therefore, that the alleged order was unilateral and wanting in mutuality was a proper finding.

The judgment of the District Court should be affirmed.

Respectfully submitted,

WM. S. NASH & S. J. GRAHAM,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation,
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COMPANY, a Corporation,
Defendant in Error.

PETITION FOR REHEARING.

Upon Writ of Error to the United States District
Court of the District of Oregon.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff in Error.

No. 4062.

United States
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Defendant in Error.

Petition and Brief for Rehearing.

The plaintiff in error respectfully petitions for rehearing in the above cause upon the following grounds:

POINT I.

The opinion rendered herein says:

“The record plainly shows that the general finding that the plaintiff had failed to sustain the averments of the complaint had reference to the merits of the case and not to the formal jurisdictional averment. Furthermore, taking the finding at its face value, it does not show a want of jurisdiction. The test of jurisdiction is the amount claimed in good faith, not the actual

amount in controversy, and there is no finding upon that issue.”

The point of practice as well as the facts in the instant case justify us, we believe, in presenting more fully our position and in asking a direct adjudication thereof.

We respectfully submit that if the findings in this case are treated as general, then the determination of all issues necessarily involves the question of the amount in controversy and such finding therefore is adverse on that issue.

In *Hill vs. Walker*, 167 Fed. 241 (8 C. C. A.), at 256, the Court says:

“Under the doctrine which we have thus considered, at perhaps too great length, the question of jurisdiction ought to be ruled against the plaintiffs in error. The allegations of citizenship in the complaint satisfy the most exact standards, and there has been no affirmative showing to overcome the *prima facie* case which they create.

“The same result might be reached upon narrower grounds. This cause was tried by the court without a jury, and a general finding made in favor of the plaintiff. It has been repeatedly held by the Supreme Court that an appellate court cannot in such a case look into the evidence for the purpose of deciding whether it supports the finding. If a bill of exceptions is preserved embodying the testimony and the rulings of the court on the trial of the case, the appellate court can only look into such bills of

exception for the purpose of deciding whether the lower court committed error in the course of the trial in its rulings upon questions of evidence and other like matters. Viewing the general denial of the answer in the most favorable light possible for the defendant, it presented the citizenship of the plaintiff as one of the issues in the cause for the decision of the trial court. *That court by its general finding has found this issue, as well as those relating to the merits, in favor of the plaintiff.* Under the ruling of the Supreme Court in the following cases, we are not at liberty to look into the record for the purpose of determining that such finding was not supported by the evidence as to every issue. *Norris vs. Jackson*, 76 U. S. 125, 19 L. Ed. 608; *Insurance Company vs. Folson*, 85 U. S. 249, 21 L. Ed. 827; *Lehnen vs. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373. See also *U. S. Fidelity Co. vs. Board of Commissioners*, 145 Fed. 144, and cases cited on page 151, 75 C. C. A. 114."

So here we urge that the court " * * * by its general finding has found this issue, as well as those relating to the merits, in favor of * * * defendant.

The evidence is not presented, and if the finding is a general one, the presumption of supporting evidence is conclusive.

Under the old practice this jurisdictional question

could be presented only by plea in abatement or special plea.

Barry vs. Edmonds, 116 U. S. 550;

Hill vs. Walker, 167 Fed. 241, at 248.

But more recent cases permit this question to be raised by denial in the answer, especially in all those states which require pleas in abatement and pleas to the merits to be joined in one answer.

Hill vs. Walker, 167 Fed. 241, at 248, et seq.

Roberts vs. Lewis, 144 U. S. 653 (36 L. 579, Point 2 syllabus), reads:

“Since the act of June 1, 1872, all defenses are open to a defendant in the United States Circuit Court under any form of plea, answer or demurrer which would have been open to him under like pleading in the courts of the state within which the Circuit Court is held.”

Gilbert vs. David, 235 U. S. 561;

N. P. S. S. Co. vs. Soley, 257 U. S. 216.

For many years the Oregon code required all pleas in abatement to be separately filed and tried before the trial on the merits, but this practice was abolished and Oregon now has, and at the time of the trial of this case had, adopted the rule of the reformed procedure states on this point.

See Oregon Laws 1920, Section 74.

In view of the foregoing, we feel justified in respectfully asking this Court to specify the rule to be followed in this jurisdiction, to wit, whether a special plea or a special defense is necessary to raise jurisdictional questions, or whether they may be

submitted under the general or specific denials and tried together with the merits.

We urge this question not alone because of its relation to the instant case, but so that the rule may be definitely established in this circuit.

The opinion further says:

“Furthermore, taking the finding at its face value, it does not show a want of jurisdiction. The test of jurisdiction is the amount claimed in good faith, not the actual amount in controversy, and there is no finding upon that issue.”

Keeping in mind Oregon Laws, Section 74, which permits the trial of jurisdictional issues and pleas in abatement with the trial on the merits, it is respectfully submitted that the quoted portion of the opinion is unquestionably the law in all states which preserve the distinction between pleas in abatement and their trial, and pleas to the merits and their trial; but, as above shown, this distinction was abolished by Oregon Laws, Section 74. We therefore respectfully urge that the rule stated in

Roberts vs. Lewis, 144 U. S. 653 (36 L. 579), is applicable to Oregon practice and to the instant case.

POINT II.

The findings, as we submit, relate to all the issues, and, if general, the sufficiency of the evidence in support thereof is conclusively presumed, as findings by the Court stand upon the same footing as the verdict by a jury.

Simpkins Federal Procedure, 225.

The Court was required to try all the issues, and

his findings, like the verdict of a jury, must relate to the whole case and determine each issue.

Bowman vs. A. T. & S. F. Ry. Co., 184 Fed. 699.

We again quote from the opinion herein:

“The test of jurisdiction is the amount claimed in good faith and not the actual amount in controversy, *and there is no finding upon that issue.*” (Italics ours.)

The findings, so construed, show reversible error on the face of the record.

In Roberts vs. Lewis, 144 U. S. 653 (36 L. 579 to 582), the Court says:

“Under this code, as under the code of New York, upon which it was modeled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of ‘each and every allegation in the petition’ puts in issue every material allegation therein, as fully as if it had been specially and separately denied. Sweet vs. Tuttle, 14 N. Y. 465; Gardner vs. Clark, 21 N. Y. 399; Donovan vs. Fowler, 17 Neb. 247; Hassett vs. Curtis, 20 Neb. 162; Maxwell Practice (4th ed.), 127, 128; Bliss Code Pleading (2d ed.), Chap. 345. And by express terms of Chap. 94, 96, above cited, an objection that the court has no jurisdiction, either of the person of the defendant, or of the subject of the action, may be taken by demurrer, if it appears on the face of the petition, and by answer if it does not so appear.

“The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court, which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the citizenship of the parties. *Continental Ins. Co. vs. Rhoads*, 119 U. S. 237 (30 L. 380).”

Hill vs. Walker, 167 Fed. 241 (at 286) says:

“That court by its general finding has found this issue, as well as those relating to the merits, in favor of the plaintiff.”

The findings under consideration are susceptible of one of two constructions only. They either embrace the jurisdictional question or they do not. If they do embrace and determine that question, the judgment should be reversed, and if they do not embrace that question, then it should, nevertheless, be reversed; under the above authorities either conclusion sustains the assigned error.

POINT III.

It is our understanding that questions of jurisdiction are never waived, but can be raised for the first time in the appellate court.

Morrison vs. Burnette, 154 Fed. 617;

Teel vs. C. & O. Ry. Co., 204 Fed. 918.

For the above reasons we believe this petition should be reversed.

Respectfully submitted,

PLATT & PLATT,

MONTGOMERY & FALES,

Attorneys for Plaintiff in Error.

United States of America,

State and District of Oregon,—ss.

I, Isham N. Smith, of counsel for plaintiff in error, certify:

That in my judgment the above petition for rehearing is well founded and that it is not interposed for delay.

ISHAM N. SMITH.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED

AUG 28 1923

F. D. HENNINGTON,

Recorder

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
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Upon Writ of Error to the United States District
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FRANK S. SENN, Yeon Building, Portland, Oregon, and WILBUR, BECKET & HOWELL, Board of Trade, Portland, Oregon, for the Plaintiff in Error.

DEVINE, HOWELL, STINE & GWILLIAM, Ogden, Utah; A. W. AGÉE, Ogden, Utah; WILLIAM A. MUNLY, Board of Trade, Portland, Oregon, and JAMES G. WILSON, Platt Building, Portland, Oregon, for the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To Oregon-American Lumber Company, GREET-
ING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Paul C. Bates is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 31st day of May, in the year of our Lord, one thousand nine hundred and twenty-three.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Service of within citation on writ of error accepted in Multnomah County, Oregon, this 31st day of May, 1923.

WM. A. MUNLY,
Of Attorneys for Defendant.

[Endorsed]: No. ——. United States District Court, District of Oregon. Paul C. Bates, vs. Oregon-American Lumber Company. Citation on Writ of Error. Filed June 1, 1923. G. H. Marsh, Clerk. By ———, Deputy Clerk. [1*]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant in Error.

*Page-number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to
the Judge of the District Court of the United
States for the District of Oregon, GREET-
ING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before the Honorable Robert
S. Bean, one of you, between Paul C. Bates, plain-
tiff and plaintiff in error, and Oregon-American
Lumber Company, defendant and defendant in er-
ror, a manifest error hath happened to the great
damage of the said plaintiff in error, as by com-
plaint doth appear; and we, being willing that er-
ror, if any hath been, should be duly corrected, and
full and speedy justice done to the parties aforesaid,
and, in this behalf, do command you, if judgment
be therein given, that then, under your seal, dis-
tinctly and openly, you send the record and pro-
ceedings aforesaid, with all things concerning the
same, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, together with this writ,
so that you have the same at San Francisco, Cali-
fornia, within thirty days from the date hereof, in
the said Circuit Court of Appeals to be then and
there held; that the record and proceedings afore-
said, being then and there inspected, the said Cir-
cuit Court of Appeals may cause further to be done
therein to correct that error, what of right and

according to the laws and customs of the United States of America should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States this 31st day of May, 1923.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States
for the District of Oregon.

The within writ of error was duly served on the District Court of the United States for the District of Oregon, on May 31, 1923, by lodging a copy thereof on May 31, 1923, with the undersigned as the clerk of said court.

G. H. MARSH,
Clerk, United States District Court, District of
Oregon.

[Endorsed]: No. L-8889. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Paul C. Bates, Plaintiff in Error, vs. Oregon-American Lumber Co., Defendant in Error. Writ of Error. Filed May 31, 1923. G. H. Marsh, Clerk, United States District Court, District of Oregon. By _____, Deputy Clerk. [2]

In the District Court of the United States for the
District of Oregon.

November Term, 1921.

BE IT REMEMBERED, that on the 27th day of January, 1922, there was duly filed in the District Court of the United States for the District of Ore-

gon a complaint, in words and figures as follows,
to wit: [3]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON AMERICAN LUMBER COM-
PANY, a Utah Corporation,

Defendants.

Complaint.

Plaintiff complains of defendant and for cause
of action alleges:

I.

That during all the times herein mentioned and
at the time of the commencement of this action,
plaintiff was and is now an inhabitant, citizen and
resident of the State of Oregon, and domiciled in
the city of Portland, Oregon, and engaged in the
insurance business as his vocation.

II.

That during all the times herein mentioned and
at the time of the commencement of this action,
the defendant the Oregon American Lumber Com-
pany was and is now a corporation duly organized
and existing under and by virtue of the laws of the
State of Utah. And during all the times herein
mentioned was and is now an inhabitant, resident
and citizen of the State of Utah. That during all
the times herein mentioned the defendant was and

is now duly licensed to do business in the State of Oregon.

III.

That during all the times herein mentioned this defendant was the owner of the following described premises: Southeast quarter of Section 32, Southwest quarter of Section 33, South half of Section 34, Southwest quarter of Section 35, South half of Section 36, in Township 5 N. 6 W. Also Northwest quarter of Section 5, West half and Northeast quarter of Section 4, West half of [4] Section 3, North half of Section 2, in Township 4 N. 6 W., aggregating 2,431.24 acres; situated in Clatsop County, State of Oregon.

IV.

That during the year 1920 and on or about November first, 1920, this defendant duly authorized and employed plaintiff to secure a purchaser for all the foregoing property, and promised and agreed to pay plaintiff 5% of the agreed purchase price of said property; whereupon plaintiff entered upon the performance of his said contract and agreement.

V.

That in accordance with said agreement and contract of hiring, this plaintiff did secure a purchaser, to wit: A. S. Kerry and Kerry Timber Company for said property. That said A. S. Kerry and Kerry Timber Company submitted to the defendant on November 8th, 1920, an offer to purchase said premises for the sum of \$821,465.00. And on the 5th day of December, 1920, this defendant through

its authorized agents and officers accepted said offer of purchase, and in accordance with said offer and acceptance said purchasers were ready, willing and able to consummate said purchase upon the terms made to and accepted by this defendant.

VI.

That in accordance with said contract and agreement of hiring between plaintiff and defendant, and because of the performance on plaintiff's part of said contract in securing persons, ready, able and willing to purchase said premises, this defendant became, and is indebted to the defendant in the sum of \$41,073.25 as compensation for said service.

VII.

That this plaintiff has demanded of the defendant, its officers and agents payment of the compensation due him, but the same has been refused. [5]

WHEREFORE, plaintiff prays for a judgment against the defendant for the sum of \$41,073.25, together with interest thereon at the rate of six per cent per annum from December 5th, 1920, and for his costs and disbursements herein.

SENN, EKWALL & RECKEN,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, Paul C. Bates being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing complaint is true as I verily believe.

PAUL C. BATES.

Subscribed and sworn to before me this 24th day of January, 1922.

[Notarial Seal]

F. S. SENN,

Notary Public for the State of Oregon.

My Commission expires July 9, 1924.

Filed January 27, 1922. G. H. Marsh, Clerk. [6]

AND AFTERWARDS, to wit, on the 15th day of July, 1922, there was duly filed in said Court, a motion for leave to amend complaint, in words and figures as follows, to wit: [7]

In the District Court of the United States for the District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER COMPANY, a Utah Corporation,

Defendant.

Motion for Leave to Amend Complaint.

Comes now the plaintiff and presents to this Court his amended complaint, and prays for an order for leave to file the amended complaint in the above-entitled matter.

WILBUR, BECKETT & HOWELL,
F. S. SENN,

Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, F. S. Senn, one of the attorneys for plaintiff, hereby certify that on this 15th day of July, 1922, I did leave at the office of W. A. Munly, 1124 Board of Trade Building, Portland, Oregon, a true, correct and certified copy of the above notice and motion, and also a true, correct and certified copy of the amended complaint, and the whole thereof. That I left said motion and amended complaint upon the desk of said W. A. Munly, said Munly not being in his office at 11:30 A. M. of the above date.

F. S. SENN.

Subscribed and sworn to before me this 15th day of July, 1922.

[Notarial Seal] LOUIS A. RECKEN,
Notary Public for Oregon.

My Commission expires Oct. 24, 1924.

Filed July 15, 1922. G. H. Marsh, Clerk. [8]

AND AFTERWARDS, to wit on Friday, the 21st day of July, 1922, the same being the 16th judicial day of the regular July term of said Court, present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [9]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

July 21, 1922.

PAUL C. BATES

vs.

OREGON-AMERICAN LUMBER COMPANY.

**Minutes of Court—July 21, 1922—Order Allowing
Plaintiff to Amend Complaint.**

Now, at this day, comes the plaintiff by Mr. Frank S. Senn and Mr. Ralph W. Wilbur, of counsel, and the defendant above named by Mr. William A. Munly, of counsel, whereupon this cause comes on to be heard upon the motion of the plaintiff for leave to file an amended complaint herein, and the Court having heard the arguments of counsel and being now fully advised in the premises,

IT IS ORDERED AND ADJUDGED that said motion be and the same is hereby allowed. Whereupon said defendant excepts to the granting of the said order, which exception is allowed by the Court.

And IT IS FURTHER ORDERED that said defendant be it is hereby allowed thirty days from this date within which to plead to said amended complaint. Whereupon, on motion of plaintiff,

IT IS FURTHER ORDERED that the date heretofore set for the trial of this cause be and the same is hereby cancelled. [10]

AND AFTERWARDS, to wit, on the 17th day of August, 1922, there was duly filed in said Court, a motion to strike out amended complaint, in words and figures as follows, to wit: [11]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Motion to Strike Amended Complaint.

Comes now the defendant, The Oregon-American Lumber Company, by its undersigned attorneys, and moves the Court for an order to strike out the amended complaint of the plaintiff filed herein, on the ground and for the reason that said amended complaint contains fifteen different and separate alleged causes of actions which are not pleaded separately but pleaded as one alleged cause of action.

That said alleged fifteen causes of actions may be found in said amended complaint as follows:

(1) The alleged cause of action contained in Paragraph V of said amended complaint concerning alleged services of the plaintiff in connection with the St. Helens Timber Company and C. R. McCormick & Company.

(2) The alleged cause of action contained in Paragraph VI of said amended complaint concerning alleged services of the plaintiff in connection with Coleman H. Wheeler, his associates and affiliated companies.

(3) The alleged cause of action contained in Paragraph VII of said amended complaint concerning alleged services of the plaintiff in connection with the Portland and Southwestern Railroad Company.

(4) The alleged cause of action contained in Paragraph VIII of said amended complaint concerning alleged services of the plaintiff in connection with Mitsui & Company and Coleman H. Wheeler, [12] his associates and affiliated companies.

(5) The alleged cause of action contained in Paragraph IX of said amended complaint concerning alleged services of the plaintiff in connection with the United Railroad Company.

(6) The alleged cause of action contained in Paragraph X of said amended complaint concerning alleged services of the plaintiff in connection with Norman R. Smith, F. W. Reimers and E. P. Denkman.

(7) The alleged cause of action contained in Paragraph XI of said amended complaint concerning alleged services of the plaintiff in connection with E. S. Collins.

(8) The alleged cause of action contained in Paragraph XII of said amended complaint concerning alleged services of the plaintiff in connection with the Long-Bell Company.

(9) The alleged cause of action contained in Paragraph XIII of said amended complaint concerning alleged services of the plaintiff in connection with Coleman Wheeler.

(10) The alleged cause of action contained in Paragraph XIV of said amended complaint concerning alleged services of the plaintiff in connection with William Lee Owens.

(11) The alleged cause of action contained in Paragraph XV of said amended complaint concerning alleged services of the plaintiff in connection with Isaac T. Mann.

(12) The alleged cause of action contained in Paragraph XVI of said amended complaint concerning alleged services of the plaintiff in connection with Stanley Dollar.

(13) The alleged cause of action contained in Paragraph XVII of said amended complaint concerning alleged services of the plaintiff in connection with H. E. Noble, E. B. Waterman and Jacob Mortenson.

(14) The alleged cause of action contained in Paragraph [13] XVIII of said amended complaint concerning alleged services of the plaintiff in connection with the Kerry Timber Company.

(15) The alleged cause of action contained in Paragraph XIX of said amended complaint concerning alleged services of the plaintiff in connection with the Central Coal & Coke Company.

DEVINE, HOWELL, STINE & GWILLIAM and
WM. A. MUNLY,
Attorneys for the Defendant, Oregon-American
Lumber Co.

State of Oregon,
County of Multnomah,—ss.

I, W. A. Munly, of attorneys for defendant, do hereby certify that I have prepared and read the foregoing motion to strike out the amended complaint of the plaintiff, and the same is made in good faith and not for the purpose of delay, and said motion in my opinion is well founded in law.

WM. A. MUNLY.

State of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this —— day of August, 1922, by receiving a copy thereof, duly certified to as such by W. A. Munly, of Attorneys for defendant.

F. S. SENN,
WILBUR, BECKETT & HOWELL,
Attorneys for Plaintiff.

Filed August 17, 1922. G. H. Marsh, Clerk. [14]

AND AFTERWARDS, to wit on Tuesday, the 5th day of September, 1922, the same being the 55th judicial day of the regular July term of said Court; present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [15]

In the District Court of the United States for the District of Oregon.

No. L—8889.

September 5, 1922.

PAUL C. BATES

vs.

OREGON-AMERICAN LUMBER COMPANY.

Minutes of Court—September 5, 1922—Order Denying Motion to Strike Out Amended Complaint.

This cause was heard by the Court on the motion of defendant to strike out the complaint herein, plaintiff appearing by Mr. Frank S. Senn and Mr. Ralph W. Wilbur, of counsel, and defendant by Mr. William A. Munly and Mr. James G. Wilson, of counsel. And the court having heard the arguments of counsel, upon consideration thereof,

IT IS ORDERED that said motion be and the same is hereby, denied,

IT IS FURTHER ORDERED that said defendant be and is hereby allowed ten days from this date to file an answer herein. [16]

AND AFTERWARDS, to wit, on the 11th day of September, 1922, there was duly filed in said Court, a motion for plaintiff to elect in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Motion for Plaintiff to Elect.

Comes now the defendant, the Oregon-American Lumber Company, by its undersigned attorneys, and moves the Court for an order requiring the plaintiff herein to elect whether plaintiff in his action will rely on a *quantum meruit*, for the reasonable value of the alleged services set forth in Paragraphs V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX of his amended complaint herein, or whether plaintiff will rely upon an express contract in said action.

DEVINE, HOWELL, STINE & GWILLIAM and
WM. A. MUNLY,
Attorneys for the Defendant, Oregon-American
Lumber Co.

State of Oregon,
County of Multnomah,—ss.

I, W. A. Munly, one of the defendant's attorneys, do hereby certify that I have prepared and read the foregoing motion, and the same is made in good faith and not for the purpose of delay, and said motion is well founded in law.

WM. A. MUNLY.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Motion is hereby accepted in Multnomah County, Oregon, this 11th day of September, 1922, by receiving a copy thereof, duly certified to as such by Wm. A. Munly, of attorneys for defendant.

F. S. SENN,
Of Attorneys for Plaintiff.

Filed Sept. 11, 1922. G. H. Marsh, Clerk. [18]

AND AFTERWARDS, to wit on Monday, the 25th day of September, 1922, the same being the 72d judicial day of the regular July term of said Court, present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [19]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

September 25, 1923.

PAUL C. BATES

vs.

THE OREGON-AMERICAN LUMBER COM-
PANY.

**Minutes of Court—September 25, 1922—Order De-
nying Motion for Plaintiff to Elect.**

Now, at this day, this cause comes on to be heard by the Court on the motion of the defendant for an order requiring the plaintiff to elect to stand upon a *quantum meruit* or upon express contract, plaintiff appearing by Mr. Frank S. Senn, of counsel, and defendant above named by Mr. William A. Munly, of counsel. And the Court having heard the arguments of counsel, upon consideration thereof,

IT IS ORDERED that said motion be and the same is hereby denied. Whereupon said defendant excepts to said ruling of the court, which exception is allowed. And thereupon on motion of said defendant,

IT IS FURTHER ORDERED that it be and is hereby allowed ten days from this date to further plead or answer herein. [20]

AND AFTERWARDS, to wit, on the 3d day of October, 1922, there was duly filed in said Court, a demurrer to amended complaint, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant.

Demurrers of the Defendant.

Comes now the above-named defendant, the Oregon-American Lumber Company, by its undersigned attorneys, and demurs to the amended complaint of the plaintiff filed herein on the following grounds, to wit:

First. That the plaintiff has not the legal capacity to sue on the grounds and for the reason that the amended complaint of the plaintiff shows on its face that the plaintiff is a real estate broker and has not alleged in his amended complaint that he had a license to act as such real estate broker, as is required by the laws of the State of Oregon.

Second. That the amended complaint of the plaintiff, does not state facts sufficient to constitute a cause of action.

DEVINE, HOWELL, STINE & GWILLIAM and
WM. A. MUNLY,
Attorneys for the Defendant, Oregon-American
Lumber Company.

State of Oregon,
County of Multnomah,—ss.

I, W. A. Munly, one of the defendant's attorneys, hereby certify that I have prepared and read the foregoing demurrers to the amended complaint of the plaintiff and that the same are made in good faith and not for the purpose of delay, and that such demurrers are well founded in law.

Oct. 3, 1922.

WM. A. MUNLY. [22]

State of Oregon,
County of Multnomah,—ss.

Due service of the within demurrers is hereby accepted in Multnomah County, Oregon, this 3d day of October, 1922, by receiving a copy thereof, duly certified to as such by Wm. A. Munly, one of attorneys for defendant.

F. S. SENN,
Attorney for Plaintiff.

Filed Oct. 3, 1922. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 18th day of December, 1922, there was duly filed in said Court, an opinion in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

No. L—8889.

December 18, 1922.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Opinion.

SENN & RECKEN for Plaintiff.

WM. A. MUNLY and DEVINE, HOWELL, STINE
& GWILLIAM for Defendant.

WOLVERTON, District Judge.—This is a demurrer to the amended complaint, predicated upon the assumption that plaintiff was a real estate broker at the dates set out therein, and was acting in that capacity while in the employ of defendant and doing the things for which he is seeking to recover compensation, and that he was not licensed as such.

The plaintiff sets forth that defendant, during August, 1917, having purchased a large tract of timber-land, employed him to assist and aid in

developing the property and the timber thereon, and in devising ways and means of securing the best possible returns, and agreed to pay him for his services and to reimburse him for expenses incurred in connection therewith. Some fifteen specifications of services rendered are alleged in the complaint, as to nearly all of which, if not all, reasonable compensation is demanded.

Section 808, Sub. 8, Lord's Oregon Laws, being a clause of the statute of frauds, was amended in 1917 (Sess. Laws 1917, p. 786), providing the manner of note or memorandum that shall be sufficient where an agent or broker is employed to sell or purchase real estate for another. In 1919 (Sess. Laws 1919, p. 238), an act was passed defining a real estate broker, and licensing [25] him to transact business as such. This act was superseded by act of the Legislative Assembly in 1921. Sess. Laws 1921, p. 438.

It will be seen from this series of acts that, while the style of agreement required on the part of real estate brokers was defined by law prior to the time plaintiff alleges he entered into the agreement of employment set forth in the complaint, namely, August, 1917, the acts requiring such persons to be licensed were adopted two and four years subsequent thereto. However, plaintiff was bound, if a real estate broker, to the observance of the statute of frauds as a prerequisite to maintaining his action. Whether the later acts are retroactive in their operation need not be discussed, in view of

the conclusion I have reached touching the purpose and effect of the complaint.

Was plaintiff a real estate broker, in view of the allegations of his complaint?

A review of the allegations of employment and specifications of services performed renders it obvious that plaintiff was not employed to sell or purchase specific tracts of realty designated by the defendant, with fixed commissions or compensation, but to collaborate with defendant in managing its property and assisting in disposing of or purchasing certain holdings. Plaintiff had no authority to buy or sell, except as his employer might direct and approve, and was always subject to his employer's directions in whatever he did in relation to the management, purchase or disposition of any real property in which it might be, or desired to be, concerned. In other words, plaintiff's employment was that of an agent, subject to special instructions and directions, and his services were rendered in pursuance thereof. He cannot, therefore, be classed as a real estate broker, within the purview of the acts of the Legislative Assembly above noted. Nor [26] does agreement for his general employment fall within the restrictions of the statute of frauds. *Sherman v. Clear View Orchard Co.*, 74 Ore. 240; *Western Lumber Co. v. Willis*, 160 Fed. 27; *Springstein v. Lewis*, 259 Fed. 518.

Demurrer overruled.

Filed Dec. 18, 1922. G. H. Marsh, Clerk. [27]

AND AFTERWARDS, to wit, on Monday, the 18th day of December, 1922, the same being the 36th judicial day of the regular November term of said Court, present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

December 18, 1922.

PAUL C. BATES

vs.

OREGON-AMERICAN LUMBER COMPANY.

Minutes of Court—December 18, 1922—Order Overruling Demurrer to Amended Complaint.

This cause was heard by the Court upon the demurrer to the amended complaint herein, plaintiff appearing by Mr. Frank S. Senn, Mr. Ralph W. Wilbur and Mr. E. K. Oppenheimer, of counsel, and the defendant by Mr. William A. Munly, of counsel. And, the Court, having heard the arguments of counsel, and being fully advised in the premises, upon consideration whereof,

IT IS ORDERED that said demurrer to the amended complaint herein be and the same is hereby overruled, to which ruling of the Court de-

fendant is allowed an exception. Whereupon on motion of said defendant,

IT IS FURTHER ORDERED that it be and is hereby allowed fifteen days from this date in which to file its answer herein. [29]

AND AFTERWARDS, to wit, on the 10th day of January, 1923, there was duly filed in said Court, an answer to amended complaint in words and figures as follows, to wit: [30]

In the District Court of the United States for the District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER COMPANY, a Utah Corporation,

Defendant.

Answer to Amended Complaint.

Comes now the defendant and answering the amended complaint of the plaintiff, alleges as follows:

I.

Answering the allegations of Paragraphs I, II and III of said amended complaint, it admits said allegations.

II.

Answering Paragraph IV of said amended complaint, the defendant admits that it was desirous

of developing the timber-lands therein mentioned, securing transportation and marketing the timber thereon, and denies each and every other allegation contained in said paragraph.

III.

Answering Paragraph V of said amended complaint, the defendant admits that at the time mentioned in said paragraph, there was a logging railroad with a terminus at St. Helens, Oregon; that the defendant was desirous of securing an outlet or transportation facilities for certain timber owned by it, but defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations as to the ownership of said road, or that plaintiff went to St. Helens, Oregon, and to San Francisco, California, or to either of said places, and denies each and every other allegation of said paragraph not in this paragraph expressly admitted. [31]

IV.

Answering the allegations of Paragraph VI of said amended complaint, the defendant admits that there was a logging railroad adjacent to a portion of the timber-lands owned by it and that it had no means of transporting the timber on said lands, but denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations concerning the ownership of the logging railroad, and denies each and every other allegation contained in said paragraph not in this paragraph expressly admitted.

V.

Answering Paragraph VII of said amended complaint, the defendant admits that at the time mentioned therein, there was a railroad in Columbia County, Oregon, with a terminus at Scappoose, Oregon, and extending toward some of the timberlands of the defendant, but denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations therein concerning the ownership of said railroad, or as to the truth of the allegations therein that plaintiff interviewed or negotiated with the officers or agents of said railroad, and denies each and every other allegation contained in said paragraph not hereinbefore expressly admitted.

VI.

Answering Paragraph VIII of said amended complaint, the defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations concerning Mitsui & Company, or as to the allegations that plaintiff accompanied representatives of the said Mitsui & Company to Cochran, Oregon, or as to the allegation that plaintiff interviewed Coleman H. Wheeler, and denies each and every other allegation contained in said paragraph not herein expressly admitted. [32]

VII.

Answering Paragraph IX of said amended complaint, the defendant admits that at the time therein mentioned there was a railroad extending from Linnton, Oregon, to Wilkesboro, Oregon, but

denies that it has any knowledge or information sufficient to form a belief as to the allegations that the plaintiff went to Linnton, Oregon, and interviewed or negotiated with officials, agents or representatives of said railroad, or that he inspected said railroad, roadbed or equipment, and denies each and every other allegation of said paragraph not hereinbefore expressly admitted.

VIII.

Answering Paragraph X of said amended complaint, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations that Norman E. Smith visited Portland, Oregon, to investigate timber lands, or as to the allegations that the plaintiff accompanied said Smith over the timber-lands of the defendant, or negotiated with said Smith or F. W. Reimers or E. P. Denkman, concerning any of said lands, and denies each and every other allegation contained in said paragraph.

IX.

Answering Paragraphs XI, XII and XIII of said amended complaint, the defendant denies each and every allegation therein and in each of said paragraphs contained.

X.

Answering Paragraph XIV of said amended complaint, the defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations that one William Lee Owens visited Portland, or as to the allegation that the plaintiff accompanied said Owens over any timber-lands of

the defendant, and [33] denies each and every other allegation contained in said paragraph.

XI.

The defendant denies each and every allegation of Paragraphs XV, XVI and XVII of said amended complaint.

XII.

Answering Paragraph XVIII of said amended complaint, defendant denies each and every allegation therein contained, and alleges that at no time was there any memorandum or agreement in writing between the plaintiff and defendant signed by this defendant or by any person authorized to sign such memorandum or agreement on its behalf, whereby the said plaintiff was employed or authorized as the agent of the defendant or otherwise to sell or negotiate for the sale of any lands of the said defendant; and also denies that there was ever any memorandum or agreement between the said plaintiff and defendant signed by the defendant or by any person authorized by it to execute any such memorandum or agreement on its behalf, whereby the said plaintiff was employed or authorized by the defendant as agent of the defendant or otherwise to sell or negotiate for the sale of any lands of the defendant, describing such lands so that the same could be identified or expressing any amount or commission or compensation to be paid to said plaintiff, or expressing any consideration for any agreement authorizing the plaintiff to sell or to negotiate the sale of any lands or interest in land or other property of the defendant.

XIII.

Answering Paragraphs XIX, XX and XXI of said amended complaint, the defendant denies each and every allegation of each and all of said paragraphs.

XIV.

Further answering said amended complaint the defendant [34] denies each and every allegation thereof not hereinbefore admitted or denied.

And for a further and separate answer and affirmative defense herein, this defendant alleges:

I.

That at all the times mentioned in the amended complaint of the plaintiff, he was engaged at Portland, Oregon, in the business negotiating and offering to negotiate for others for compensation and profit, both directly and indirectly, as principal, the purchase, sale, exchange, lease and rental of real estate and of interest in real estate as his principal or partial vocation, and that at none of such times had he secured a license from the Insurance Commissioner of the state of Oregon, or any other person in said state as a real estate broker.

And for a second further and separate answer and affirmative defense to said amended complaint, the defendant alleges:

I.

That at no time was there any contract or memorandum of agreement in writing signed by the defendant, or by any person authorized to make any such contract or agreement on its behalf, employing or authorizing the plaintiff to sell or purchase

any real estate or any interest in real estate, as agent for the defendant, for a compensation or commission. That at no time mentioned in said complaint was there any contract or memorandum of agreement in writing signed by the defendant, or by any person authorized to make any such contract or agreement, employing or authorizing the plaintiff as agent or employee of the defendant or otherwise to sell or purchase, or negotiate the sale or purchase of any [35] real estate or any interest in real estate or other property, in which said real estate was described, or in which the amount of commission or compensation to be paid to said plaintiff was expressed, or any memorandum or agreement of any kind signed by the defendant or by any person authorized by it to make any contract or agreement on its behalf, authorizing or employing the plaintiff to sell or negotiate the sale of any lands or other property of the defendant or to purchase or to negotiate the purchase of any lands or other property for the defendant, or to do any of the things which the plaintiff in his said amended complaint alleges that he did under the alleged contract mentioned in said amended complaint.

And for a third further and separate answer and affirmative defense, the defendant further alleges:

I.

That at all times mentioned in said amended complaint, the defendant was a corporation duly organized and incorporated under the laws of the State of Utah and authorized to do business as such, with its principal place of business at Ogden City, Utah,

with a Board of Directors consisting of five persons, and that during all of such times there was in full force and effect in said State of Utah a statutory provision or law providing that in case the Articles of Incorporation of any corporation formed under the laws of said state do not provide for the sale or other disposition of the property of the corporation, then the act of the Board of Directors in the sale or other disposition of the property of the corporation shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action [36] of the board; and further, that at all such times there was in full force and effect in the State of Utah a statutory provision or law which provided that the corporate powers of any and all corporations organized under the laws of the state shall be exercised by the Board of Directors. The defendant further alleges that the Articles of Incorporation of the defendant do not now, and at no time did provide for the sale or disposition of any of the property of the defendant by any of its officers or by its Board of Directors, and that no officer, manager, managing agent or other agent or employee of said defendant had any authority to make on behalf of the defendant the contract or contracts of hiring or employment or any of them set out in the plaintiff's amended complaint, or to make any contract with the plaintiff for the sale or for negotiating the sale of any lands or other property belonging to the defendant, or for the purchase or negotiating for the

purchase of any lands or other property on behalf of defendant, and that no such contract has ever been made or entered into on behalf of the defendant by its Board of Directors or by any person or persons with the knowledge or consent of such Board of Directors or on behalf of the defendant.

And for a further answer and partial affirmative defense to plaintiff's action and as a defense to Paragraph XIX of said amended complaint, the defendant alleges as follows:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, doing business in the State of Oregon under and by virtue and in compliance with the laws thereof.

II.

That the defendant corporation was not at any time [37] and is not authorized or empowered by law, its Articles of Incorporation or otherwise, nor were any of the officers or agents on its behalf empowered to make any contract by which the said defendant corporation would be liable for or pay commission or compensation for the sale of the stock of the stockholders of said corporation to any purchaser or purchasers thereof at any time.

III.

That neither during the year 1920, nor at any time was said defendant corporation or any of its officers or agents, authorized or empowered to employ the plaintiff herein to secure purchasers for and dispose of the capital stock of the stockholders

of said corporation to Central Coal & Coke Company, a corporation, of Kansas City, Missouri, or to any other person or corporation, and said defendant corporation and its officers and agents were not empowered to contract with said plaintiff to pay plaintiff a commission or compensation of two and one-half per cent, or any other per cent or sum whatever, upon the sale of any or all of said capital stock of its stockholders, and that said corporation and its officers and agents were without power to make or execute any contract of employment of the plaintiff for the sale of the stock of its stockholders or any of them, as set forth in plaintiff's amended complaint herein, or at all, and any such alleged contract, if made, which defendant denies, is null, void and beyond the powers of the corporation to make.

WHEREFORE, the defendant prays that the plaintiff take nothing by his amended complaint, and that defendant corporation go hence without day and recover of and from the plaintiff its costs and disbursements in its behalf incurred.

DEVINE, HOWELL, STINE & GWILLIAM and WM. A. MUNLY,

Attorneys for the Defendant. [38]

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, James G. Wilson, being first duly sworn, on my oath depose and say that I am the statutory agent appointed for the State of Oregon of the defendant

Oregon-American Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Utah; that I have read the foregoing answer to amended complaint and that the facts therein stated are true, as I verily believe.

JAMES G. WILSON.

Subscribed and sworn to before me this 9th day of January, 1923.

[Seal]

E. M. MOLTZNER,
Notary Public for Oregon.

My Commission expires —.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 10th day of January, 1923, by receiving a copy thereof, duly certified to as such by Wm. A. Munly, of attorneys for defendant.

F. S. SENN,
Attorney for Plaintiff.

Filed Jan. 10, 1923. G. H. Marsh, Clerk. [39]

AND AFTERWARDS, to wit, on the 20th day of January, 1923, there was duly filed in said court, a reply in words and figures as follows, to wit: [40]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Reply.

Plaintiff replying to defendant's answer to plaintiff's amended complaint admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained and the whole thereof unless herein specifically admitted.

I.

Plaintiff replying to defendant's first further and separate answer and affirmative defense admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained and the whole thereof, except admits that plaintiff had secured no license from the Insurance Commissioner of the State of Oregon or any other person in said state as a real estate broker.

Plaintiff replying to defendant's second further

and separate answer and affirmative defense admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained, and the whole thereof.

Plaintiff replying to defendant's third further and separate answer and affirmative defense admits, denies and alleges as follows: [41]

I.

Plaintiff has not sufficient knowledge or information upon which to form a belief as to the truth or the falsity of the allegations contained in paragraph I thereof and, therefore, denies the same, except admits that at all the times mentioned in plaintiff's amended complaint the defendant was a corporation duly organized and incorporated under the laws of the State of Utah and authorized to do business as such.

Plaintiff replying to defendant's further answer and partial affirmative defense to plaintiff's action, and as a defense to paragraph XIX of said amended complaint, admits, denies and alleges as follows:

I.

Denies each and every allegation therein contained and the whole thereof unless herein specifically admitted.

II.

Admits paragraph I thereof.

III.

Denies paragraphs II and III thereof.

Plaintiff further replying to defendant's answer to plaintiff's amended complaint alleges:

I.

That during all the times referred to in plaintiff's amended complaint the defendant was duly licensed to do business in the State of Oregon, and during all the times mentioned therein was, and now is, engaged in doing business in the State of Oregon, and maintained an office, among other places in the City of Portland, Oregon.

II.

That said office was maintained and in charge of the [42] president of the defendant corporation, its general manager, and heavy stockholders and directors of said corporation, and all the matters and things set forth in plaintiff's amended complaint were known to said officers and agents of the defendant company at Portland, Oregon, and said matters and things were brought to the attention and knowledge of the directors and stockholders of said corporation located in the State of Utah as well as its general counsel, and said directors and officers and stockholders permitted the officers and agents of said corporation in Portland, Oregon, to hold themselves out to the public and especially the plaintiff as being fully clothed with authority and power to represent said corporation in all matters and things set forth in plaintiff's amended complaint, and said directors and officers and stockholders and general counsel of said defendant company located in the State of Utah knew of all things which plaintiff was performing and had performed

for defendant and sanctioned the same and authorized the Oregon representatives of the defendant company to continue the employment of the said plaintiff and authorized and consented to the employment of said Bates, and therefore, said defendant should be estopped from setting forth any lack of authority on the part of the representatives at Portland, Oregon. That said representatives at Portland and said officers, agents, directors and stockholders of said defendant company made material representations of fact to this plaintiff and had actual knowledge thereof, well knowing that plaintiff relied on said representations and that if the agents lacked authority to act for said defendant, plaintiff was ignorant of such lack of authority, and it was intended by the defendant and its officers, agents, directors and stockholders that plaintiff should act on said representations of the Oregon representatives of said defendant corporation, and said plaintiff did act on the same and to his prejudice, as set forth in plaintiff's amended complaint. [43]

WHEREFORE, plaintiff having fully replied to defendant's answer to plaintiff's amended complaint, reiterates the prayer of his complaint.

SENN & RECKEN,

WILBUR, BECKETT & HOWELL,

Attorneys for Plaintiff.

United States of America,
District of Oregon,
State of Oregon,
County of Multnomah,—ss.

I, Paul C. Bates, being first duly sworn, say:
That I am the plaintiff in the above-entitled suit;
that I have read the foregoing reply and know the
contents thereof, and that the same is true of my
own knowledge, except as to matters therein stated
upon information and belief, and as to such mat-
ters I believe the same to be true.

PAUL C. BATES.

Subscribed and sworn to before me this 18th
day of Jan. 1923.

[Seal]

E. K. OPPENHEIMER,
Notary Public for Oregon.

My Commission expires 9/12/23.

United States of America,
District of Oregon,—ss.

Due and timely service of the within reply and the
receipt of a duly certified copy thereof, all at the
city of Portland in the District of Oregon, is
hereby admitted.

WM. A. MUNLY,
Attorney for Defendant.

Filed Jan. 20, 1923. G. H. Marsh, Clerk. [44]

AND AFTERWARDS, to wit, on the 21st day of March, 1923, there was duly filed in said court, a motion for leave to amend amended complaint, in words and figures as follows, to wit:
[45]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Motion for Leave to Amend Amended Complaint.

Comes now the plaintiff and moves this Court for an order giving and granting to the plaintiff the right to amend Paragraph XVIII of plaintiff's amended complaint, to read as follows, to wit:

“That this defendant was desirous of selling a portion of its said timber-land in and about Rock Creek, Columbia County, Oregon, and plaintiff, under his general contract of hiring, was requested to and did interview the agents, officers and representatives of the Kerry Timber Company, for the purpose of selling and disposing of, to the said Kerry Timber Company, a portion of said timber holdings approximating 2400 acres of the said timber-land of this defendant. That the agents and officers of the Kerry Timber Company made offers

to the said defendant and to this plaintiff for the purchase of said timber-land of approximately 2400 acres, and under said general contract of hiring it was agreed between the plaintiff and the defendant that this said plaintiff should be paid a reasonable sum for his services in endeavoring to make said sale, the same to include all expenses to which said plaintiff might be put to regarding the same; and it was further agreed between the said plaintiff and the defendant that if the said plaintiff was able to complete the said sale to the said Kerry Timber Company, and was able to procure as a purchaser the said Kerry Timber Company, who would be ready, able and willing [46] to consummate said sale upon terms agreed upon, that there would be paid to the said plaintiff by the said defendant, as a reasonable compensation for his services, all sums received for said timber land in excess of \$3.00 per thousand. That it was estimated that the said 2400 acres to be sold to the Kerry Timber Company had thereon about 260,783,000 feet of timber and that said timber was to be sold to the said Kerry Timber Company for the sum of \$3.15 per thousand; and this said plaintiff and the said defendant did offer the said timber-land to the said Kerry Timber Company for the sum of \$3.15 per thousand. That at the time said offer was made the said timber-land was under mortgage and it was agreed by the plaintiff and this defendant, in the proposition to the said Kerry Timber Company, that the said 2400 acres could be segregated from the rest of the timber-land owned by the defendant, as contained

in said mortgage, and that the rate of interest would be reduced to the said Kerry Timber Company for the balance of the mortgage term, to $4\frac{1}{2}\%$, and that the Kerry Timber Company could pay to the said defendant the sum of \$250,000.00 in cash and give a mortgage to the mortgagee for the balance of the purchase price, to run at the rate of $4\frac{1}{2}\%$, which proposition was made by the said plaintiff and defendant to the said Kerry Timber Company and its officers; and the officers of the said Kerry Timber Company were favorable to said sale, but that the said defendant, before the said deal was completed, refused to abide by the agreement or proposition made by this plaintiff and defendant to the Kerry Timber Company, and insisted that the said Kerry Timber Company must pay 6% upon said mortgage on deferred payments, and that as a result the said sale between the defendant and the Kerry Timber Company for said 2400 acres was not consummated. That as a result of the services of this plaintiff, as hereinabove alleged, and under the contract of general hiring from the said defendant in the attempted disposal of said 2400 acres to the Kerry Timber Company, the said defendant became indebted to this plaintiff for [47] the reasonable and agreed value of the plaintiff's services in the matter of the negotiations with the Kerry Timber Company, in the sum of \$39,117.45."

WILBUR, BECKETT & HOWELL,
F. S. SENN,

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within motion is hereby accepted in Multnomah County, Oregon, this 21st day of March, 1923.

WM. A. MUNLY,

One of the Attorneys for Defendant.

Filed March 21, 1923. G. H. Marsh, Clerk. [48]

AND AFTERWARDS, to wit, on Monday, the 26th day of March, 1923, the same being the 19th judicial day of the regular March term of said court, present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [49]

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant.

Minutes of Court—March 26, 1923—Order Allowing Motion.

This matter coming on upon the motion of the plaintiff by his attorneys, Senn & Recken and Wilbur, Beckett & Howell, for leave to file by the plaintiff a second amended complaint, and said motion being opposed by the defendant appearing by its attorney, William A. Munly, the Court, after duly considering the matter, allows said motion subject to the orders and conditions hereinafter set forth.

IT IS THEREFORE ORDERED that the plaintiff be, and he is hereby allowed to file his second amended complaint herein, subject to the following conditions and orders:

1. That the defendant be, and it is hereby allowed an exception to the order permitting the plaintiff to file said second amended complaint.

2. It is further ORDERED that the answer heretofore filed by said defendant to the first amended complaint be and the same is hereby permitted to stand as a full answer to the plaintiff's second amended complaint, it being understood that in all particulars, except Paragraph XVIII, plaintiff's second amended complaint corresponds to plaintiff's first amended complaint; and

3. IT IS ORDERED that each and every allegation of said Paragraph XVIII of said second amended complaint is denied by said defendant, and said defendant further alleges as part of said answer to said Paragraph XVIII of said second

amended complaint, same as in the answer to the first amended complaint, as follows: [50]

“Alleges that at no time was there any memorandum or agreement in writing between the plaintiff and defendant signed by this defendant or by any person authorized to sign such memorandum or agreement on its behalf, whereby the said plaintiff was employed or authorized as the agent of the defendant or otherwise to sell or negotiate for the sale of any lands of the said defendant; and also denies that there was ever any memorandum or agreement between the said plaintiff and defendant signed by the defendant or by any person authorized by it to execute any such memorandum or agreement on its behalf, whereby the said plaintiff was employed or authorized by the defendant as agent of the defendant or otherwise to sell or negotiate for the sale of any lands of the defendant, describing such lands so that the same could be identified, or expressing any amount or commission or compensation to be paid to said plaintiff, or expressing any consideration for any agreement authorizing the plaintiff to sell or to negotiate the sale of any lands or interest in land or other property of the defendant.”

(4) IT IS FURTHER ORDERED that the reply of the plaintiff to the answer of the defendant herein to the first amended complaint may stand, and be considered to be the reply to the answer of the defendant to the second amended complaint.

(5) IT IS FURTHER ORDERED that all the motions, demurrers and pleadings heretofore filed to the first amended complaint by the defendant are hereby considered as filed against the second amended complaint, and that the orders and decisions of the Court heretofore made on said motions, demurrers and pleadings of the defendant as to the amended complaint of the plaintiff are hereby considered the orders and decisions on said motions, demurrers and pleadings as to the second amended complaint.

(6) IT IS FURTHER ORDERED that by allowing the filing of said second amended complaint by said plaintiff, the said defendant does not waive any of its rights, objections or exceptions to the orders and decisions made by this Court to any of the motions, demurrers or pleadings which have been made and filed by the defendant, and that said orders and decisions of this Court stand and are considered as the orders and decisions of this Court on said [51] motions, demurrers and pleadings considered and agreed as made and filed by the defendant to the plaintiff's second amended complaint.

(7) IT IS FURTHER ORDERED that all the rights that have accrued and may now accrue to said defendant as to the filing of said motions, demurrers and pleadings and against the orders and decisions thereon by this Court, are hereby protected and preserved for the use and benefit of said defendant, whether before this Court or before any court on writ of error from this Court.

(8) IT IS FURTHER ORDERED that by filing said second amended complaint by said plaintiff and his acceptance of the order of the Court in permitting and allowing said second amended complaint to be filed, the plaintiff has agreed to all of the orders and conditions herein, and has waived and does waive any right to objection or exception to the same.

Given in open court this 26th day of March, 1923.

CHAS. E. WOLVERTON,

Judge.

State of Oregon,

County of Multnomah,—ss.

Due service of the within order is hereby accepted in Multnomah County, Oregon, this — day of March, 1923, by receiving a copy thereof, duly certified to as such by

WM. A. MUNLY,

Of Attorneys for Defendant.

Filed March 26, 1923. G. H. Marsh, Clerk. [52]

AND AFTERWARDS, to wit, on the 26th day of March, 1923, there was duly filed in said court, a second amended complaint in words and figures as follows, to wit: [53]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

THE OREGON-AMERICAN LUMBER CO., a
Utah Corporation,

Defendant.

Second Amended Complaint.

Comes now the plaintiff and by leave of Court first had and obtained files this, his second amended complaint, and for his cause of action alleges:

I.

That during all the times herein mentioned this plaintiff was and is now an inhabitant, citizen and resident of the State of Oregon, and domiciled in the city of Portland, Multnomah County, Oregon.

II.

That during all the times herein mentioned this defendant was and is now a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and during all the times herein mentioned was and is now domiciled in the State of Utah, but duly licensed to do business in the State of Oregon, and during all the times herein mentioned was and is now engaged in doing business in the State of Oregon.

III.

That on, to wit, July 1, 1917, this defendant cor-

poration became the owner by purchase of a large tract of timber-land in Columbia, Clatsop and Tillamook Counties, Oregon, comprising 27,331.31 acres, for which this defendant paid the sum of \$3,650,000.00. That at the time of said purchase said property was undeveloped, with no transportation facilities whatsoever and was and is valuable [54] chiefly for its standing timber.

IV.

That this plaintiff was familiar with said timber tract, knew its condition, the contour of the country and the possibilities of development. That this defendant was desirous of developing said tract of timber, securing transportation facilities and marketing the timber thereon; and knowing plaintiff's familiarity with said property, and well knowing that plaintiff was better qualified to direct and assist in the development and marketing of said tract of land and the timber thereon than any other person, did, immediately after said purchase and during August, 1917, hire and employ this defendant to assist and aid in developing and marketing said property, and did, at said time, contract and agree with plaintiff to employ this plaintiff to look after said property, to assist in marketing the timber thereon, in devising ways and means for securing the best possible returns from said property; and this defendant contracted and agreed to pay plaintiff for his services and reimburse him for his expenses in carrying out and performing the services herein agreed upon. That in accordance with said contract of hiring this plaintiff did,

immediately thereafter, enter upon the discharge of his work and employment, and at all times thereafter this plaintiff held himself in readiness and his services were at the disposal of defendant.

V.

That the St. Helens Timber Company and C. R. McCormick & Company, duly organized corporations, were the owners of a certain logging railroad, together with logging equipment, rights of way and other facilities for handling logs and timber. That said logging railroad has its terminus at St. Helens, Oregon, and from which place it is constructed up Milton Creek in Columbia County, Oregon, toward and in the direction of the defendant's heretofore mentioned [55] timber-land. That this defendant was desirous of securing an outlet or transportation facilities for said timber, and in accordance with said desire and in accordance with the aforesaid contract of employment, this defendant and its agents and officers did, on August 6, 1917, direct, instruct and request this plaintiff to negotiate with the officers and agents of said St. Helens Timber Company and said C. R. McCormick & Company, for the purpose of securing transportation facilities over said logging railroad, and also ordered and directed plaintiff to negotiate with the officers, agents and representatives of said St. Helens Timber Company and the said C. R. McCormick & Company, for the purpose of securing an interest in said logging railroad equipment, roadbed, and rights of way. That in accordance with the orders and instructions of this defendant and under

the aforesaid contract of hiring, this plaintiff, on August 6, 1917, went to St. Helens, Oregon, went over said properties at length and thereafter on, to wit, August 7, 1917, went to San Francisco, California, where this plaintiff interviewed the officers, agents and representatives of the said St. Helens Timber Company and the said C. R. McCormick & Company, the aforementioned corporation, and negotiated with said officials and representatives for the purpose of securing transportation facilities, railroad equipment, rights of way and terminal facilities for this defendant. That as a result of said negotiations this plaintiff secured from said St. Helens Timber Company and said C. R. McCormick & Company, the corporations aforesaid, an option in favor of defendant, its officers, agents and representatives, for the purchase of said transportation facilities, including logging railroad, equipment, roadbed, rights of way and terminal facilities in St. Helens, Oregon, for the sum of \$300,000.00, which option was in effect for a period of six [56] months. That this plaintiff was engaged for a period of fifteen days in negotiating for said option and in investigating said properties, and his services in said matter were and are reasonably worth the sum of \$1,125.00. That this plaintiff was required to expend various expenses in carrying on said negotiations and investigating said properties, to wit; automobile hire to St. Helens and return, railroad fare to San Francisco and return, hotel bills while in San Francisco, all in the total sum of \$118.60. That by reason of the plain-

tiff's services rendered to defendant in the matter of the negotiations with said St. Helens Timber Company and said C. R. McCormick & Company, all at the request of this defendant, and by reason of expenses and disbursements incurred by this plaintiff on behalf of the defendant during said negotiations, this defendant became, was and is now indebted to plaintiff by virtue of said negotiations with said St. Helens Timber Company and said C. R. McCormick & Company, in the sum of \$1,243.60.

VI.

That Coleman H. Wheeler, his associates and affiliated companies, during the years 1917, 1918, 1919, 1920 and 1921, were the owners of a logging railroad, logging equipment, rights of way and other transportation facilities at and near Cochran, Oregon. That the said logging railroad of the said Coleman H. Wheeler, his associates and affiliated companies, was adjacent and in close proximity to, to wit, 6300 acres of timber-land belonging to this defendant company, all of said 6300 acres being a part and parcel of the aforesaid 27,331.31 acres purchased by defendant on July 1, 1917. That this defendant company had no means or transportation facilities whereby the timber located upon said 6300 acres could be logged and transported to market. That this defendant, its officers and agents, were desirous of securing transportation [57] facilities over the logging railroad and equipment of said Coleman H. Wheeler, his associates and affiliated companies, and in De-

cember, 1917, this defendant, its officers and agents, ordered, directed and instructed plaintiff, under the aforesaid general contract of hiring, to interview and negotiate with the said Coleman H. Wheeler for the purpose of securing transportation facilities for the logs and products of the defendant company over the railroad and equipment of said Coleman H. Wheeler, his associates and affiliated companies. That in accordance with said orders and directions, plaintiff did, at various times, from December, 1917, to and including October, 1918, negotiate with said Coleman H. Wheeler for the purpose of securing transportation facilities over said logging railroad. That plaintiff, in accordance with the aforesaid contract of hiring, negotiated with Chairman of Fir Production Dept. of the U. S. War Industry Board and went to Cochran, Oregon, and inspected the logging railroad of said Coleman H. Wheeler, and the equipment thereof and interviewed said Coleman H. Wheeler, also interviewed and negotiated with the said Coleman H. Wheeler on numerous occasions at the office of said Coleman H. Wheeler in Portland, Oregon, and negotiated with said aforesaid Chairman of Fir Production Department. That this plaintiff rendered services for a period of thirty-two days in negotiating with and in interviewing said Chairman, Coleman H. Wheeler and in inspecting the logging railroad equipment and transportation facilities and in examining said 6300 acres. That this plaintiff's services for said thirty-two days were and are reasonably worth the sum

of \$2400.00. That this plaintiff, in accordance with said contract of hiring, was compelled to and did expend certain monies in his negotiations with said Coleman H. Wheeler as aforesaid, consisting of railroad fare from Portland to Cochran and return, and hotel bills, all in the sum of \$19.72. That by reason [58] of the services rendered by this plaintiff to this defendant and expenses in the matter of the negotiations with the said Coleman H. Wheeler and others, this defendant became, was and is now indebted to the plaintiff in the sum of \$2,419.72.

VII.

That the Portland and Southwestern Railroad Company is the owner of a railroad in Columbia County, Oregon, the terminus of which is at Scappoose, Oregon, and said railroad extends from Scappoose, Oregon, toward the timber-land of this defendant. That this defendant was desirous of securing transportation facilities over the railroad of said Portland & Southwestern Railroad Company and was desirous of securing an interest in or a lease of said railroad. That during, to wit, September of 1917, this defendant, under the aforesaid contract of hiring, ordered, directed and requested plaintiff to interview and negotiate with the owners, officials and agents of said Portland & Southwestern Railroad Company, the corporation aforesaid, for the purpose of securing a lease of or transportation facilities upon the logging railroad of said Portland & Southwestern Railroad Company. That it was desired by this defendant to

secure an interest in or lease of or transportation facilities over said railroad as the same then existed, and to further secure an agreement from the said Portland & Southwestern Railroad Company for an extension of said railroad to the town of Vernonia, Oregon. That in accordance with said contract of employment and under defendant's instructions and at its request, this plaintiff interviewed and negotiated with the officers and agents of said Portland & Southwestern Railroad Company, which negotiations resulted in securing for this defendant and from said Portland & Southwestern Railroad Company, a proposal for the sale of a one-half interest in said railroad, equipment [59] thereof and rights of way, based upon a total valuation of \$280,000.00, of which amount this defendant was required to pay the sum of \$140,000.00. It was further agreed between the Portland & Southwestern Railroad Company and the defendant that it, the Portland & Southwestern Railroad Company, would extend said railroad to Vernonia, Oregon, which point is in proximity to the timber of this defendant, and that the cost of said extension should be divided equally between the defendant company and the said Portland & Southwestern Railroad Company. That this plaintiff, in negotiating with and interviewing said officers and agents of the Portland & Southwestern Railroad Company, rendered services to the defendant under the aforesaid contract of hiring, for a period of twenty days and that said services were and are reasonably worth the sum of \$1,500.00. That this

plaintiff, in rendering said services, went over the property and railroad of the said Portland & Southwestern Railroad Company, making a trip to Scappoose, Oregon, and that the expenses incurred by plaintiff for automobile hire to Scappoose and return to Portland, and for telegrams, meals and hotel accommodations, were and are the sum of \$17.50. That by reason of the services rendered to this defendant in negotiations with the said Portland & Southwestern Railroad Company, and the expenses incurred by plaintiff in said negotiations, this defendant became, was and is now indebted to plaintiff in the sum of \$1,517.50.

VIII.

That during the month of May, 1918, Mitsui & Company, of Tokio, Japan, were contemplating the purchase of timber-land and lumbering operations in the State of Oregon, and particularly the saw-mill, logging railroad and lumbering operations of Coleman H. [60] Wheeler, his associates and affiliated companies. That the logging operations of the said Coleman H. Wheeler adjoined a portion of the timber-land of this defendant and approximately 6300 acres of the timber-land of this defendant was adjacent to and contiguous with the logging operations of the said Coleman H. Wheeler, and the timber upon said 6300 acres of this defendant was more accessible to the operations of the said Coleman H. Wheeler than to that of any other possible means of operation. That this defendant, knowing of said proposed negotiations of said Mitsui & Company with the said Coleman

H. Wheeler, desired this plaintiff to interview the representatives of the said Mitsui & Company, for the purpose of disposing to said Mitsui & Company of said 6300 acres of timber-land at the same time that the said Coleman H. Wheeler disposed of his operations to said Mitsui & Company; and with such purpose in view, this defendant company did, in May of 1918, order, request and direct this plaintiff to interview said Mitsui & Company, also said Coleman H. Wheeler, for the purpose of disposing of said 6300 acres of land. That in accordance with said orders and directions under the aforesaid contract of hiring, this plaintiff did accompany the representatives of said Mitsui & Company, over the property of said Coleman H. Wheeler and the property of this defendant. That this plaintiff accompanied said representatives of said Mitsui & Company to Cochran, Oregon, interviewed said Coleman H. Wheeler and journeyed over the property of the said Coleman H. Wheeler and of this defendant. That this plaintiff negotiated with said Mitsui & Company, under said contract and agreement with defendant for a period of over two years and rendered services to this defendant in interviewing the representatives of said Mitsui & Company and negotiating with them for a [61] period of thirty days. That this plaintiff's services were and are reasonably worth the sum of \$2,250.00 by reason of his negotiations and services rendered in the matter of Mitsui & Company. That this plaintiff, in order to properly show the property of this defendant to the said Mitsui & Company, incurred

expenses in the hire of an automobile in the sum of \$250.00, railroad fare of \$4.86, maps \$49.50, board and hotel bills \$60.00, or total expenses of \$364.36. That by reason of this plaintiff's services heretofore rendered in the matter of the Mitsui & Company negotiations and expenses incurred and paid by plaintiff therein, this defendant became, was and is now indebted to plaintiff in the sum of \$2,464.00.

IX.

That the United Railroad Company was a railroad from Linnton, Oregon, to Wilksboro, Oregon. That this defendant company was desirous of leasing said railroad and then extending the same into the timber-lands of this defendant. That in order to secure a lease of said United Railroad this defendant did, during the month of September, 1918, order, direct and request this plaintiff to interview and negotiate with the representatives and officials of the United Railroad Company, and in accordance with said orders and directions, and under said contract of hiring, this plaintiff did interview the agents and representatives of said United Railroad and did go to Linnton, Oregon, inspected and looked over said railroad, roadbed and equipment. That the said negotiations with the agents of the said United Railroad continued from September, 1918, until February, 1919. That as a result of said services and negotiations this defendant did lease from the said United Railroad said railroad, rights of way, equipment and terminal facilities, for a period of ninety-nine years at an annual rental [62] of \$45,000.00. That this plaintiff,

by reason of said negotiations, rendered services to this defendant for a period of thirty days. That the said services were and are reasonably worth the sum of \$2,250.00. That this plaintiff, in carrying on said negotiations, made a trip to Linnton over the property of the said United Railroad, and expended for automobile hire, hotels, meals and telegrams, the sum of \$75.00. That by reason of said negotiations with the said United Railroad and by reason of the services rendered therein by the plaintiff to the defendant, and expenses incurred and paid by plaintiff, this defendant became, was and is now indebted to plaintiff in the sum of \$2,325.00.

X.

That during the month of August, 1918, Norman R. Smith, of Hammond, Louisiana, for himself and his associates, F. W. Reimers, of Hammond, Louisiana, and E. P. Denkman, of Chicago, Illinois, came to Portland for the purpose of investigating timber-lands. This defendant, its officers and agents, under their contract of hiring with plaintiff, requested and directed plaintiff to negotiate with said Norman R. Smith, F. W. Reimers and E. P. Denkman for the purpose of interesting said Norman R. Smith, F. W. Reimers and E. P. Denkman in the timber-land of this defendant or in the capital stock of this defendant. That in accordance with the orders and directions of defendant, plaintiff accompanied said Norman R. Smith over the timber-land of this defendant and negotiated with said Norman R. Smith, F. W. Reimers and E. P. Denk-

man over a period of two and one-half years, commencing with August, 1918, for the sale of an interest in or a portion of said property, and finally for the sale of all of said property. That this plaintiff rendered services for a period of twenty-five days in negotiating with and presenting to said Norman R. Smith said property, and that said services were [63] and are reasonably worth the sum of \$1,875.00. That this plaintiff did, in order to properly show said property to said Norman R. Smith, hire an automobile to go over said property and did hire services of a timber cruiser in order to locate certain corners of said property and certain lines; and this plaintiff expended in automobile hire, as a necessary expense, the sum of \$75.00, and for the services of a timber-cruiser \$60.00; and by reason of the services of this plaintiff in the matter of the negotiations with the said Norman R. Smith, E. P. Denkman and F. W. Reimers, and expenses incurred therein, this defendant became, was and is indebted to plaintiff in the sum of \$2,010.00.

XI.

That this defendant, during the month of March, 1919, ordered, requested and directed plaintiff to interview and negotiate with one E. S. Collins for the purpose of selling to the said E. S. Collins a portion of the stock of the defendant company, or a portion of the timber-land of this defendant. That in accordance with said request, orders and directions, and under said contract of hiring heretofore mentioned, this plaintiff interviewed the said E. S. Collins and negotiated with the said E. S.

Collins for a period covering eighteen months, commencing with March of 1919. That this plaintiff, in order to properly negotiate with the said E. S. Collins and properly show said property, accompanied said E. S. Collins, together with a timber-cruiser, camping outfit and other equipment, over said property, journeyed from one end of the same to the other; and this plaintiff rendered services to the defendant in the matter of the negotiations with said E. S. Collins for a period of thirty days. That this plaintiff, in order to properly show said property to said E. S. Collins and to properly negotiate with him for the same, was required to hire a cruiser, one George Bowers, and was required to and did pay said George Bowers the sum of \$220.00 for services in said negotiations with said E. S. Collins, and was compelled to and did pay to one Read \$60.00 for use of horses, camping outfit and other services in making said trip and did expend for railroad fare the sum [64] of \$14.58, and for one map \$30.00. That by reason of said plaintiff's services rendered for the defendant in the matter of the negotiations with said E. S. Collins, and the expenses of this plaintiff incurred and expended therein, this defendant became, was and is now indebted to plaintiff, by reason of said matters, in the sum of \$2,574.58.

XII.

That during the month of March, 1919, plaintiff, under his contract of hiring with defendant and at defendant's request, commenced negotiating with the Long-Bell Company and its officials, for the

purpose of disposing or selling a portion of the timber-land of this defendant or a portion of its capital stock. That in accordance with said contract of hiring and at the request of defendant and its officials, this plaintiff did, for a period of four months beginning with March, 1919, interview and negotiate with the officials of the Long-Bell Lumber Company. That this plaintiff went to San Francisco to interview one E. H. Cox, agent for and representative of the Long-Bell Lumber Company; and at the request of and under the orders and directions of the defendant, plaintiff submitted to said Long-Bell Lumber Company, on June 19, 1919, a proposal for the sale of one-half of the property of the defendant company to the said Long-Bell Lumber Company. That this plaintiff, in said negotiations, rendered services for a period of fifteen days of the reasonable value of \$1,125.00, and expended in expenses during said negotiations, railroad fare to San Francisco, California, in the sum of \$31.60, and hotel bills in the sum of \$20.00. That by reason of the said services of plaintiff to defendant and under said contract of hiring and by reason of the expenditures heretofore mentioned, this defendant became, and was indebted to plaintiff in the sum of \$1,276.60, [65] by reason of plaintiff's negotiations with the said Long-Bell Lumber Company.

XIII.

That during the month of January, 1919, this defendant company, having previously learned that it could not make satisfactory traffic arrange-

ments for the transportation of its logs with Coleman H. Wheeler, ordered and requested this plaintiff to interview said Coleman H. Wheeler for the purpose of selling to said Coleman H. Wheeler approximately 6300 acres of timber-land adjoining and adjacent to the logging operations of said Coleman H. Wheeler. That this plaintiff, in accordance with the request and instructions of the defendant, made two trips to Cochran, Oregon, for the purpose of interviewing Coleman H. Wheeler, seeking to sell to said Coleman H. Wheeler, for this defendant, said 6300 acres of timber-land, and negotiating with said Coleman H. Wheeler during the entire year of 1919 and 1920 for the purpose of selling said 6300 acres to Coleman H. Wheeler. That plaintiff rendered services for a period of fifteen days in negotiating with said Coleman H. Wheeler at Cochran, Oregon, and in the city of Portland, Oregon. That said services were and are of the reasonable value of \$1,125.00, and this plaintiff, in making said trips to Cochran, expended for railroad fare the sum of \$9.72. That by reason of the services aforesaid and by reason of the expenses incurred and expended by plaintiff this defendant became, was and is now indebted to plaintiff in the sum of \$1,134.72.

XIV.

That during the month of September, 1919, one William Lee Owens came to Portland, and this defendant requested plaintiff to accompany said William Lee Owens over the timber-lands of this defendant for the purpose of selling to said Will-

iam Lee Owens a portion of said timber-lands. That this plaintiff did, during September of 1919, accompany said William Lee Owens over the said timber-lands of this defendant and rendered services to this defendant for a [66] period of five days, of the reasonable value of \$375.00. That by reason of the services and auto hire \$50.00, and hotel bill \$50.00, rendered by plaintiff to the defendant in the matter of the negotiations with said William Lee Owens, and expenses, this defendant became, was and is now indebted to this plaintiff in the sum of \$475.00.

XV.

That on May 5, 1919, this plaintiff did, under said contract of hiring, and in accordance with the request, orders and directions of the defendant, make a journey to Washington, New York and Boston, for the purpose of interviewing and negotiating with one Isaac T. Mann, president of the Pocahontas Consolidated Colliers Co., for the purpose of disposing of a portion of the stock of timber-land of this defendant company to the said Isaac T. Mann, and this plaintiff did, under said contract of hiring and at the request, orders and directions of the defendant, render services to this defendant for a period of five days in negotiating with and interviewing said Isaac T. Mann, which services were and are reasonably worth the sum of \$375.00; and this plaintiff did expend for railroad fare and hotel bills the further sum of \$100.00 in negotiating with said Isaac T. Mann. That by reason of said negotiations with said Isaac T. Mann and by reason

of the aforesaid services and expenses this defendant became, was and is now indebted to plaintiff in the sum of \$475.00.

XVI.

That during the month of July, 1920, this defendant requested and directed this plaintiff to interview and negotiate with one Stanley Dollar, of the Stanley Dollar Company, San Francisco, California, for the purpose of selling to said Stanley Dollar from one-fourth to four-tenths of the capital stock of the [67] defendant company. That under said contract of hiring heretofore mentioned and in accordance with said orders and directions from this defendant, this plaintiff went to San Francisco, interviewed said Stanley Dollar and his associates, and plaintiff rendered services for a period of twenty days, of the reasonable value of \$1,500.00, in negotiating with said Stanley Dollar, and expended for railroad fare the further sum of \$63.60, and hotel bills in the further sum of \$30.00; and by reason of said negotiations and said services and expenses heretofore mentioned, with said Stanley Dollar and associates, this defendant became, was and is now indebted to plaintiff in the sum of \$1,593.60.

XVII.

That on September 23, 1919, this plaintiff was requested and directed, under said contract of hiring by this defendant, its officers and agents, to interview Mr. H. E. Noble, of Portland, Oregon, for the purpose of securing the purchase price of 8,000,000 feet of timber adjacent to the tunnel-site

of the defendant company's railroad in Columbia County, Oregon, and in accordance with the orders and directions of this defendant and under said contract of hiring, plaintiff interviewed said H. E. Noble and rendered services for a period of one day. That this defendant did request and direct this plaintiff, under his contract of hiring heretofore mentioned, to interview one E. B. Waterman for the purpose of interesting said E. B. Waterman in the timber-lands of this defendant, and this plaintiff did interview said E. B. Waterman and rendered services in negotiating with said E. B. Waterman for a period of one day; and this plaintiff did further, at the request of defendant and under his contract of hiring, negotiate with one Jacob Mortenson for the purpose of interesting said Jacob Mortenson in the capital [68] stock of the timber-lands of this defendant. That said plaintiff, in negotiating with said H. E. Noble, E. B. Waterman and Jacob Mortenson, rendered services for a period of three days, of the reasonable value of \$225.00; and this defendant, by reason of said negotiations and rendering of said services, became, was and is now indebted to plaintiff in the sum of \$225.00.

XVIII.

That this defendant was desirous of selling a portion of its said timber-land in and about Rock Creek, Columbia County, Oregon, and this plaintiff, under his general contract of hiring, was requested to and did interview the agents, officers and representatives of the Kerry Timber Company, for the

purpose of selling and disposing of, to the said Kerry Timber, a portion of said timber holdings, approximating 2400 acres of the said timberland of this defendant. That the agents and officers of the Kerry Timber Company made offers to the said defendant and to this plaintiff for the purchase of said timberland of approximately 2400 acres, and under said general contract of hiring it was agreed between the plaintiff and the defendant that this said plaintiff should be paid a reasonable sum for his services in endeavoring to make said sale, the same to include all expenses to which said plaintiff might be put to regarding the same; and it was further agreed between the said plaintiff and the defendant that if the said plaintiff was able to complete the said sale to the Kerry Timber Company, and was able to procure as a purchaser the said Kerry Timber Company, who would be ready, able and willing to consummate said sale upon terms agreed upon, that there would be paid to the said plaintiff by the said defendant, as a reasonable compensation for his services, all sums received for said timberland in excess of \$3.00 per thousand. That it was estimated that [69] the said 2400 acres to be sold to the Kerry Timber Company has thereon about 260,783,000 feet of timber and that said timber was to be sold to the said Kerry Timber Company for the sum of \$3.15 per thousand; and this said plaintiff and the said defendant did offer the said timberland to the said Kerry Timber Company for the sum of \$3.15 per thousand. That at the time

said offer was made the said timber-land was under mortgage and it was agreed by the plaintiff and this defendant, in the proposition to the said Kerry Timber Company, that the said 2400 acres could be segregated from the rest of the timber-land owned by the defendant, as contained in said mortgage, and that the rate of interest would be reduced to the said Kerry Timber Company for the balance of the mortgage term, to $4\frac{1}{2}\%$, and that the Kerry Timber Company could pay to the said defendant the sum of \$250,000.00 in cash and give a mortgage to the mortgagee for the balance of the purchase price, to run at the rate of $4\frac{1}{2}\%$, which proposition was made by the said plaintiff and defendant to the said Kerry Timber Company and its officers; and the officers of the said Kerry Timber Company were favorable to said sale, but that the said defendant, before the said deal was completed, refused to abide by the agreement or proposition made by this plaintiff and defendant to the Kerry Timber Company, and insisted that the said Kerry Timber Company must pay 6% upon said mortgage on deferred payments, and that as a result the said sale between the defendant and the Kerry Timber Company for said 2400 acres was not consummated. That as a result of the services of this plaintiff, as hereinabove alleged, and under the contract of general hiring from the said defendant in the attempted disposal of said 2400 acres to the Kerry Timber Company, the said defendant became indebted to this plaintiff for the reasonable and agreed value of the plaintiff's services in the matter

[70] of the negotiations with the Kerry Timber Company, in the sum of \$39,117.45.

XIX.

That during the month of November, 1920, and prior thereto, this defendant, under the aforesaid contract of hiring and at its request, directed plaintiff to sell a portion of its capital stock, or, failing to sell a portion of its capital stock in November of 1920, ordered and directed plaintiff to sell all of the capital stock of this defendant corporation. That under said general contract of hiring and in accordance with the orders and directions of defendant, this plaintiff negotiated with the agents, representatives and officials of the Central Coal & Coke Company, a corporation of Kansas City, Missouri, and delivered to the said agents and representatives of the said Central Coal & Coke Company of Kansas City, Missouri, maps and plats of all the timber-lands of this defendant, whereupon the agents and representatives of the said Central Coal & Coke Company investigated and inspected said timber-lands and negotiated with defendant for the purchase of defendant's capital stock. That the said Central Coal & Coke Company, by reason of the negotiations of the plaintiff with its agents and representatives, and by reason of the acts and efforts of plaintiff, did purchase from this defendant all of the capital stock of the defendant company for the sum of \$7,000,000.00. That this plaintiff's services, in the sale of said capital stock to said Central Coal & Coke Company, were and are reasonably worth two and one-half per cent of the

sale price of said property. That this defendant was advised and informed that plaintiff's services, if said property was sold to the said Central Coal & Coke Company, would be worth, reasonably, two and one-half per cent of the sale price. That this defendant acquiesced in and ratified said statement [71] and consummated the sale of said capital stock to said Central Coal & Coke Company. That this plaintiff's services were and are reasonably worth two and one-half per cent of said sale price, and by reason of the sale of said capital stock to the said Central Coal & Coke Company, and by reason of the services of this plaintiff and said negotiations, this defendant became, was and is now indebted to plaintiff, by reason of the sale of said property to the Central Coal & Coke Company, in the sum of \$175,000.00.

XX.

That all of the services rendered by the plaintiff to this defendant and for the benefit of this defendant were under the general contract of hiring heretofore mentioned, and all of the expenses incurred by and paid by plaintiff in rendering the foregoing services and in the foregoing negotiations were all necessary and reasonable services under said plaintiff's general contract of hiring with this defendant, and all of said expenses were incurred and paid by plaintiff under said general contract of hiring. That all of said services were rendered by this plaintiff to this defendant in accordance with his contract of hiring with defendant.

XXI.

That prior to the commencement of this action this plaintiff demanded of and from defendant, payment for the services aforesaid. That this defendant has refused and declined to pay the same or any part thereof, and that the whole and every part in the amount herein claimed is due and owing from this defendant to this plaintiff.

WHEREFORE, plaintiff prays for a judgment against the defendant for the sum of \$234,002.13, and for his costs and disbursements herein.

F. S. SENN,

WILBUR, BECKETT & HOWELL,

Attorneys for Plaintiff. [72]

State of Oregon,

County of Multnomah,—ss.

I, Paul C. Bates, being first duly sworn, depose and say that I am the plaintiff in the above-entitled action; and that the foregoing second amended complaint is true as I verily believe.

PAUL C. BATES.

Subscribed and sworn to before me this 22d day of March, 1923.

[Notarial Seal]

LOUIS A. RECKEN,

Notary Public for the State of Oregon.

My Commission expires Oct. 24, 1924.

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within second

amended complaint is hereby tendered in Multnomah County, Oregon, this 22d day of March, 1923.

WM. A. MUNLY,

One of the Attorneys for the Defendant.

Filed March 26, 1923. G. H. Marsh, Clerk. [73]

AND AFTERWARDS, to wit, on the 4th day of April, 1923, there was duly filed in said Court, a verdict in words and figures as follows, to wit: [74]

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant.

Verdict.

We, the jury, duly impanelled and sworn in the above-entitled action, by direction of the Court, find for the defendant.

H. N. BURPEE,

Foreman.

Filed Apr. 4, 1923. G. H. Marsh, Clerk. [75]

AND AFTERWARDS, to wit on Wednesday, the 4th day of April, 1923, the same being the 27th judicial day of the regular March term of said Court, present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [76]

In the District Court of the United States for the District of Oregon.

No. L—8889.

April 4, 1923.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant.

Minutes of Court—April 4, 1923—Judgment.

Now, at this day, come the parties hereto by their counsel as of yesterday, whereupon the jury empaneled herein being present and answering to their names, the trial of this cause is resumed. Whereupon, on motion of defendant for a directed verdict in favor of said defendant,

IT IS ORDERED that said motion be, and the same is hereby allowed, and thereupon, without retiring from the jury-box, by direction of the Court said jury return the following verdict, viz.:

“We, the Jury, duly empanelled and sworn in the above-entitled action, by direction of the Court find for the defendant.

H. N. BURPEE,
Foreman.”

which verdict is received by the court and ordered to be filed. Whereupon, on motion of said defendant for judgment upon said verdict,

IT IS ADJUDGED that plaintiff take nothing by this action, that said defendant go hence without day, and that said defendant do have and recover of and from plaintiff its costs and disbursements herein taxed in the sum of \$245.68, and that execution issue therefor. [77]

AND AFTERWARDS, to wit, on the 31st day of May, 1923, there was duly filed in said Court, a petition for writ of error in words and figures as follows, to wit: [78]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

Petition for Writ of Error.

Paul C. Bates, plaintiff in the above-entitled action, feeling himself aggrieved by the action of the

Court and the judgment of the above-entitled action, entered on the 4th day of April, 1923, by which it was adjudged that the defendant take judgment against the plaintiff for the sum of \$245.-68/100, costs and disbursements, comes now and petitions the above Court for an order allowing this plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, on that behalf made and provided, and that a transcript of the record and proceedings and all papers upon which the judgment and rulings herein were rendered, duly authenticated as by law provided, may be sent to the United States Circuit Court of Appeal for the Ninth Circuit, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error, and your Petitioner will ever pray.

R. W. WILBUR,

F. S. SENN,

Attorneys for Petitioner.

State of Oregon,

County of Multnomah,—ss.

I, Paul C. Bates, being first duly sworn depose and say that I am the petitioner and plaintiff named herein and that the foregoing facts are true as I verily believe.

PAUL C. BATES. [79]

Subscribed and sworn to before me this 31st day of May, 1923.

[Seal]

F. S. SENN,

Notary Public for Oregon.

My Commission expires July 9, 1924.

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within petition is hereby accepted in Multnomah County, Oregon, this 31st day of May, 1923.

WM. A. MUNLY,

One of the Attorneys for Def.

Filed May 31, 1923. G. H. Marsh, Clerk. [80]

AND AFTERWARDS, to wit, on the 31st day of May, 1923, there was duly filed in said Court, an assignment of errors in words and figures as follows, to wit: [81]

In the District Court of the United States for the District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

Assignment of Errors.

Comes now the plaintiff above named and in connection with his petition for writ of error in the above-entitled action suggests that there was error

on the part of the District Court of the United States for the District of Oregon, in regard to the matters and things herein set forth, and plaintiff makes this, his

ASSIGNMENT OF ERRORS.

First. That the Court erred in striking out from the record the testimony of Charles T. Early, and the plaintiff herein alleges that said testimony was competent, relevant and material and that error was committed in striking said evidence from the record.

Second. That the Court erred in holding that the plaintiff's offer of proof did not constitute sufficient evidence to permit the case to go to the jury, and therefore the Court erred in rejecting said offer of proof.

Third. That the Court erred in directing the jury to return a verdict for the defendant upon the ground that there was not sufficient evidence authorizing a recovery, because there was no competent evidence sustaining the hiring of the plaintiff by the defendant corporation.

R. W. WILBUR,

F. S. SENN,

Attorneys for Plaintiff.

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within assignment of error [82] is hereby accepted in Multnomah County, Oregon, this 31st day of May, 1923.

WM. A. MUNLY,

One of the Attorneys for Defendant.

Filed May 31, 1923. G. H. Marsh, Clerk. [83]

AND AFTERWARDS, to wit on Thursday, the 31st day of May, 1923, the same being the 72d judicial day of the regular March term of said Court, present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [84]

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

**Minutes of Court—May 31, 1923—Order Allowing
Writ of Error.**

On this 31st day of May, 1923, came the above-named plaintiff by F. S. Senn, his attorney, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, intended to be urged by the plaintiff, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the 4th day of April, 1923, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and such other and further proceedings may be had as may appear proper in the premises.

On consideration whereof the Court does hereby allow the said writ of error and that citation issue as by law provided.

It is further ordered that the amount of the supersedeas bond to be given by said plaintiff be and the same is hereby fixed at the sum of Five Hundred Dollars with good and sufficient surety to be approved by this Court which bond now being filed with W. N. Pearson as surety is hereby approved and allowed.

Dated May 31st, 1923.

R. S. BEAN,
Judge.

Filed May 31, 1923. G. H. Marsh, Clerk. [85]

AND AFTERWARDS, to wit, on the 31st day of
—, 1923, there was duly filed in said court, a
bond on writ of error, in words and figures as
follows, to wit: [86]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Paul C. Bates, as principal and W. E.

Pearson, as surety are held and firmly bound unto the Oregon-American Lumber Company in the sum of Five Hundred Dollars, to be paid to the said Oregon-American Lumber Company, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 31st day of May, 1923.

Whereas, the above-named Paul C. Bates has applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled cause by the District Court of the United States for the District of Oregon.

Now therefore, the condition of this obligation is such that if the said Paul C. Bates shall prosecute said writ to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PAUL C. BATES.

W. E. PEARSON.

State of Oregon,
County of Multnomah,—ss.

I, W. E. Pearson, whose name is subscribed as surety [87] to the undertaking, being first duly sworn, for himself, says: I am a resident and house and free holder of the County of Multnomah, State of Oregon, and am worth the sum of One Thousand (\$1000.00) Dollars over and above all my debts and

liabilities, and exclusive of property exempt from execution.

W. E. PEARSON.

Subscribed and sworn to before me this 31st day of May, 1923.

[Seal]

F. S. SENN,

Notary Public for Oregon.

Commission expires July 9, 1924.

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within undertaking is hereby accepted in Multnomah County, Oregon, this 31st day of May, 1923.

WM. A. MUNLY,

One of the Attorneys for Def.

Filed May 31, 1923. G. H. Marsh, Clerk. [88]

AND AFTERWARDS, to wit on Thursday, the 31st day of May, 1923, the same being the 72d judicial day of the regular March term of said court, Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [89]

In the District Court of the United States for the
District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

**Minutes of Court—May 31, 1923—Order Certifying
Exhibits.**

Now, at this day, it appearing that plaintiff's exhibits numbered 1 to 8 inclusive introduced in evidence upon the trial of this cause, should be inspected by the Appellate Court upon the appeal herein;

It is ordered that said exhibits numbered 1 to 8 inclusive, be certified up with the record to the United States Circuit Court of Appeals for the Ninth Circuit.

R. S. BEAN,
Judge.

Filed May 31, 1923. G. H. Marsh, Clerk. [90]

AND AFTERWARDS, to wit, on the 23d day of June, 1923, there was duly filed in said court, a bill of exceptions, in words and figures as follows to wit: [91]

In the District Court of the United States for the
District of Oregon.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED heretofore, to wit: On the second day of April, 1923, at Portland, Oregon, in the District Court of the United States, for the District of Oregon, the above-entitled cause came on for trial to be heard before the Honorable Robert S. Bean, Judge of the above-entitled Court, presiding, and a jury duly and regularly impaneled to try the issues herein. The plaintiff appeared in person and by his attorneys Ralph W. Wilbur and F. S. Senn, and the defendant appeared by its attorneys James H. DeVine, A. W. Agee, Wm. A. Munly, Wm. P. Richardson, and J. G. Wilson, whereupon the following proceedings were had.

The opening statement of the jury was made on behalf of the plaintiff by F. S. Senn and an opening statement on the behalf of the defendant was made by James H. DeVine. Charles T. Early, being duly sworn, was called as a witness on behalf of the plaintiff to sustain the issues on behalf of the plaintiff. The testimony of said witness, Charles T. Early, both direct and cross, together with the exhibits offered by both the plaintiff and

defendant, the exceptions taken by respective counsel to said testimony, the motions to strike out said testimony of said Charles T. Early by the defendant, the offer of proof and the motion for a directed verdict by the defendant together with all the rulings of the Court in regard to said exceptions and motions and all the proceedings had in the above matter are as follows: [92]

Testimony of Charles T. Early, for Plaintiff.

CHARLES T. EARLY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. WILBUR.)

Where do you reside, Mr. Early?

Mr. DEVINE.—Before proceeding we desire to object to the introduction of any testimony under the complaint in this action, first upon the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant; second, upon the ground that these individual allegations contained in each paragraph of the complaint being specific take it out of the general class of employment, and for that reason it does not state facts sufficient to constitute a cause of action. Further, upon the issues joined in the opening statement of counsel for plaintiff in this action and the facts which he states he is about to prove, the plaintiff is not entitled to recover in this action.

COURT.—The sufficiency of the complaint was passed on by Judge Wolverton on demurrer, was

(Testimony of Charles T. Early.)

it not? It will be overruled and you can have your exception.

Q. Where do you reside, Mr. Early?

A. Portland.

Q. How long have you lived there, Mr. Early?

A. About eight or nine years, I think.

Q. And during that time, what has been your occupation generally?

A. Up to the fall of 1921, I was with the Oregon Lumber Company, the Oregon-American Lumber Company and the P. A. & P. Railway Company.

Q. The Oregon Lumber Company that you refer to was one of the Eccles interests? A. Yes, sir.

Q. In this state, and had lumber holdings in this state? A. Yes, sir. [93]

Q. And the Oregon-American Lumber Company, you say you represented that company?

A. Yes, sir.

Q. In what capacity did you represent that company in this state?

Mr. DEVINE.—Object to that as not the best evidence, if the Court please; hearsay.

COURT.—I think he may answer the question. Exception saved.

Mr. WILBUR.—That will raise the question of not only actual authority, but apparent authority, which we are going into in detail before we get through with this phase of the case. We will have to build it up generally along the line.

A. I always understood I was general manager.

(Testimony of Charles T. Early.)

Mr. DEVINE.—In the light of that answer, I move the Court to strike it out.

COURT.—Let him state what he did.

Mr. WILBUR.—I will follow it up later.

Q. Were you a stockholder in the Oregon-American Lumber Company? A. Yes, sir.

Q. State whether or not you were on the Board of Directors? A. I was.

Q. Were you a vice-president?

A. I am not certain about that, I think I was.

Mr. WILBUR.—I would like at this time, your Honor, to file a certified copy of the articles of incorporation of the Oregon-American Lumber Company as they were filed and certified to by the Clerk of the Court in Utah. I believe that has been stipulated by Mr. Munly. [94]

Plaintiff's Exhibit 1.

ARTICLES OF INCORPORATION
OF THE
OREGON-AMERICAN LUMBER COMPANY.

United States of America,
State of Utah,
County of Weber,—ss.

Whereas, the undersigned, whose full names and places of residence are

David C. Eccles, Ogden, Weber County, Utah.

M. S. Browning, Ogden, Weber County, Utah.

Joseph Scowcroft, Ogden, Weber County,
Utah.

Royal Eccles, Ogden, Weber County, Utah.

L. R. Eccles, Ogden, Weber County, Utah.

Charles T. Early, Baker, Baker County, Ore-
gon,

are desirous of associating themselves together for the purpose of forming a corporation under the laws of the State of Utah, have, for this purpose, adopted, and do hereby adopt, certify, agree and declare the following to be their Articles of Incorporation and Agreement, to wit:

Article 1.

The name of the corporation hereby formed shall be "Oregon-American Lumber Company," and is organized at Ogden City, County of Weber, State of Utah.

Article 2.

The corporation shall exist for one hundred years, unless sooner dissolved according to law.

Article 3.

The object, business and pursuit of the corporation hereby created is and shall be:

A. To conduct, pursue and carry on the business of [95] owning and operating sawmills, flumes, shingle mills, planing mills and all kinds of wood working machinery;

B. To own, operate, sell and dispose of lumber yards;

C. To buy, sell and manufacture lumber, lath, shingles, sash, doors, boxes and all other products manufactured from lumber;

D. To own, operate, manufacture generally, store, transmit, buy, sell and distribute electric current for heat, light and power, and to erect, buy, sell, lease and otherwise acquire, operate and maintain electric light, heating and power plants;

E. To purchase, own, acquire, encumber, sell and dispose of all kinds of real estate within or without the United States, either for the purpose of securing or supplying timber for the manufacture of lumber, or for the purpose of using such timber-lands (when cleared) or other lands for agricultural purposes of all kinds;

F. To appropriate, acquire, own and use the water of lakes and running streams for the development and furnishing of electrical power for any and all purposes;

G. To appropriate, acquire and own waters of lakes or running streams for the purpose of irrigation or supplying water for household or domestic construction, watering livestock and for general irrigation purposes;

H. To own, acquire, construct, operate and maintain irrigation streams; or other water ways, for the generation of electrical and other power for general sale and distribution, and for the operation of mills, lighting, heating and power plants, and for the general distribution of water, for sale and rental, for irrigation, domestic and livestock purposes, and for the purpose of irrigating lands belonging to this company and other individuals or concerns, and to dispose of any part or parts of such irrigation and power systems or water

rights in such manner as the [96] Board of Directors may from time to time determine;

I. To buy, sell, lease, distribute, or otherwise dispose of water and water rights;

J. To build transmission lines for light, heat, power, telephone, or telegraph purposes, and to acquire, buy, own or sell franchises or rights of way for any of the purposes herein mentioned;

K. To locate, enter upon, pre-empt, or otherwise acquire, in lawful manner, any of the public domain of the United States or any foreign country;

L. To own, handle and control letters patent and inventions, and shares of its own capital stock and that of other corporations, and to vote any other stock owned by the same, as a natural person might do;

M. To issue bonds, notes, debentures and other evidences of indebtedness, and secure the payment of the same by mortgage, deed of trust or otherwise;

N. To carry on any or all of the following businesses, namely; builders, contractors, decorators, merchants and dealers in stone, lime, brick, timber, hardware or other building requisites, brick and tile, terra cotta makers, job masters, carriers, licensed victualers and house agents;

O. To own, lease and operate tram roads, railroads, or other roads and steamboats and barges for the transportation of any commodities manufactured or produced by the company, or to convey any raw material to the mills or factories owned

or operated by the company; also side boons and pocket boons and shear boons at and near said mills for the purpose of catching and holding logs and other timber to be used and manufactured at said mills.

P. To lend money, either with or without security, and generally to such persons and upon such terms and conditions as the company [97] may think fit;

Q. And in general to do and perform such acts and things and transact such business, not inconsistent with the law in any part of the world, as the Board of Directors may deem to the advantage of the corporation, whether such branches of business are specifically mentioned herein or not.

R. The foregoing clauses shall be construed both as objects and powers, but no recitation, expression or declaration of specific or special powers, or purposes herein enumerated shall be deemed to be exclusive; but it is hereby expressly declared that all other lawful powers not inconsistent therewith are hereby included.

Article 4.

The general office of the corporation shall be at Ogden City, Weber County, Utah, but places of business and branch offices for conducting and carrying on any portion of the business may be established at any other place or places.

Article 5.

The amount of the capital stock of the corporation shall be Three Million, Five Hundred Thousand (\$3,500,000.00) Dollars, divided into thirty-five thou-

sand (35,000) shares of the par value of One Hundred (\$100.00) Dollars each.

Article 6.

The amount of capital stock subscribed and taken by each of the incorporators, parties hereto, is as follows:

Name	No. of Shares
David C. Eccles,	1000
M. S. Browning,	1000
Joseph Scowcroft,	500
Royal Eccles,	500
L. R. Eccles,	500
Charles T. Early,	500
David C. Eccles, Trustee,	31000

Article 7.

The number and kind of officers of the corporation shall [98] be as follows:

A Board of five (5) Directors, one of whom shall be President; one of whom shall be Vice-President of the corporation, and one may be Treasurer of the corporation and one may be Secretary of the corporation, provided, however, that the Secretary may, but need not, be a director or Stockholder of the corporation; and provided further that the Treasurer may, but need not, be a member of the Board of Directors of the corporation; provided also that the office of Treasurer may be held by the President or any Vice-President of the corporation, or by the Secretary when the Secretary is a Stockholder of the corporation.

Each person to be eligible to election as a Director must be the owner and holder, in his own

name, of at least one share of the capital stock, as shown by the books of the Company.

Three members of the entire Board of Directors shall be necessary to form a quorum, and be authorized to transact the business and exercise the corporate powers of the corporation.

The Board of Directors may appoint one of their own number, or any other person, General Manager of the corporation, and the duties of the General Manager shall be to look after and superintend all of the affairs of the Company, and, subject to such regulations as may be imposed by the Board of Directors, to employ all assistance and labor necessary therefor, contract for the compensation of all employees, and discharge any person so employed. The General Manager shall make report to the Board of Directors annually, or oftener if required so to do, setting forth in detail the results of operations under his charge, together with any suggestions looking to the improvement and betterment of the conditions of the Company, and to perform such other [99] duties as the Board of Directors shall require.

Article 8.

Within five days after the election of a Board of Directors, they shall hold a Directors' Meeting and elect a President, a Vice-President, a Secretary and a Treasurer.

Article 9.

(a) There shall be an annual meeting of the stockholders held at the office of the corporation in Ogden City, Weber County, Utah, on the second

Tuesday after the first Monday in January, 1918, and on the second Tuesday after the first Monday in January in each year thereafter, at such hour as the President or the Board of Directors may determine, for the purpose of electing a Board of (5) Directors, and transacting such other business as may be necessary or convenient for the welfare of the corporation.

(b) The Board of Directors may direct the calling of special meetings of the stockholders at such time as they may deem necessary; and at all such meetings of the stockholders, whether annual or special, a representation of a majority of the capital stock of the corporation shall be necessary for the transaction of business; and no business, except to adjourn, or to adjourn to a specified time, shall be transacted at any meeting of the stockholders unless a majority of the capital stock is represented.

(c) The officers of the corporation shall be elected by ballot, and the person having a majority of votes cast shall be deemed and declared duly elected. Each stockholder shall be entitled to as many votes as he holds shares of the capital stock, and representation by proxy, duly appointed, in writing, shall be allowed at all meetings of the stockholders, whether annual or special. [100]

(d) The failure to hold any annual or special meeting of the stockholders on the day or at the time appointed for the same shall not forfeit or interfere in any way with the corporate rights acquired under this agreement, and any such meeting may be held at any subsequent time, upon giv-

ing ten days' notice thereof, by publication in a daily newspaper published in Ogden City, Weber County, Utah.

The Secretary shall, and in case of his failure, any other officer of the corporation may give ten days' notice of all annual or special meetings of the stockholders, by publication, as aforesaid. The notice must specify the purpose or purposes for which any such meeting is called. Notice of all annual or special stockholders' meetings may be served by the Secretary, or other officer as the case may be, by delivering a copy to each stockholder, personally, or by depositing notice thereof in the United States Post Office, at Ogden, Utah, with postage prepaid thereon, at least ten days' prior to the date of such meeting, addressed to the addresses of the stockholders; which delivery of such notice, or the posting thereof as aforesaid, shall have the same effect as the publication thereof as aforesaid.

Article 10.

The term of office of all officers, except as provided in Article 11, shall be one year, and until their successors are elected and qualified.

Article 11.

Until the annual meeting of the Stockholders, to be held on the second Tuesday after the first Monday in January, 1918, and the election and qualification thereafter of a Board of Directors, the following named persons shall be the Directors of this corporation, to wit: [101]

David C. Eccles, M. S. Browning, Joseph Scowcroft, Royal Eccles, and Charles T. Early. And the

said David C. Eccles shall be President, and the said Charles T. Early shall be Vice-President, and the said M. S. Browning shall be Treasurer, and the said Royal Eccles shall be Secretary of the corporation, and the said David C. Eccles shall also be General Manager of the corporation.

Article 12.

The Board of Directors may hold meetings at the General office of the Company in Ogden City, Weber County, Utah, or at any other place of business of said corporation within the State of Utah.

The Board of Directors may fill vacancies occurring in the Board of any of the offices of the corporation until the next annual meeting for the election of officers.

Article 13.

The Board of Directors may enact by-laws for the conduct, regulation and management of the affairs of the corporation, and may change the same at pleasure.

Article 14.

Any officer of the corporation may be removed for conduct prejudicial to the interests of the corporation by a majority vote of the stockholders.

Article 15.

Any officer of the corporation may resign his office by giving the Board of Directors thirty days' notice thereof, in writing, before the same is to take effect, but such resignation may be accepted on shorter notice.

Article 16.

The private property of the stockholders shall

not [102] be liable for the debts, obligations or liabilities of the corporation.

Article 17.

The capital stock of this corporation, when issued, shall be fully paid and nonassessable.

Article 18.

The title to all property, real and personal, acquired by the corporation shall be vested in the corporation.

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names this 20th day of June, A. D. 1917.

DAVID C. ECCLES,
By ROYAL ECCLES,
M. S. BROWNING,
JOSEPH SCOWCROFT,
By ROYAL ECCLES,
ROYAL ECCLES,
CHARLES T. EARLY,
By J. H. DEVINE,
L. R. ECCLES.

State of Utah,
County of Weber,—ss.

M. S. Browning, Royal Eccles and L. R. Eccles, three of the parties to the foregoing Articles of Agreement for the incorporation of the Oregon-American Lumber Company, being duly sworn, each for himself, and not one for the other, says:

I am one of the persons named in the foregoing Articles of Agreement for the incorporation of the Oregon-American Lumber Company, that it is the *bona fide* intention of said incorporators to com-

mence and carry on the business mentioned in this agreement; and that I verily believe that each party to said agreement has paid in full for the amount of capital stock in said corporation [103] subscribed for by him, and that all the stock subscribed for by each stockholder has been paid, and that more than one-third of the authorized capital stock of the corporation has been fully paid before the signing of these Articles of Incorporation.

M. S. BROWNING.

ROYAL ECCLES.

L. R. ECCLES.

State of Utah,

County of Weber,—ss.

On the 23d day of June, 1917, before me, the undersigned Notary Public in and for said County and State, personally appeared M. S. Browning, L. R. Eccles and Royal Eccles, three of the persons whose names are subscribed to the foregoing Articles of Incorporation as parties thereto, personally known to me to be the persons named therein, and who executed the agreement as parties thereto, and they, and each of them, then and there severally duly acknowledged to me that they and their associates executed the same, freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS my hand and notarial seal, at Ogden City, Utah, the day and year herein first above written.

My Commission expires January 20, 1918.

[Seal]

J. H. DEVINE,

Notary Public.

Filed Jun. 26, 1917. C. M. Ramey, County Clerk.
By Winnifred Geiger.

State of Utah,
County of Weber,—ss.

I, Lawrence A. Van Dyke, County Clerk and *ex-officio* Clerk of the Second Judicial District Court of the State of [104] Utah in and for the County of Weber, do hereby certify that the foregoing is a full, true and correct copy of the original.

ARTICLES OF INCORPORATION
of the

OREGON-AMERICAN LUMBER COMPANY.

Filed in my office June 26th, 1917, as appears on file and of record in my office in Ogden City.

Witness my hand and seal, this the 15th day of March, 1923.

[Seal] LAWRENCE A. VAN DYKE,
Clerk.

I, Lawrence A. Van Dyke, Clerk of the District Court of the Second Judicial District, do hereby certify that I am the legal custodian of the records of Weber County, Utah, and the legal keeper of all of said records and that all of the records of Weber County, Utah, are in my possession; that the attached Articles of Incorporation of the Oregon-American Lumber Company is a full, true and correct copy of the original Articles of Incorporation of the Oregon-American Lumber Company, filed with me as the County Clerk of the County of Weber and State of Utah; that I have compared the same with the origi-

nal thereof and know that the same is a true, full and correct transcript of the original.

LAWRENCE A. VAN DYKE,
Clerk.

I, James N. Kimball, Judge of the District Court of the Second Judicial District of Weber County, Utah, certify that the aforesaid Lawrence A. Van Dyke is Clerk of Weber County, Utah, and is the Clerk of the District Court of the Second Judicial District of the County of Weber, State of Utah, and is the legal keeper and custodian of the papers and records of Weber County, Utah, and [105] that the foregoing signature is the signature of said Clerk and the foregoing seal is the seal of Weber County, Utah.

JAMES N. KIMBALL,
Judge.

I, Lawrence A. Van Dyke, Clerk of Weber County, Utah, certify that the foregoing James N. Kimball is Judge of the District Court of the Second Judicial District of Weber County, Utah, and is the duly acting, qualified and commissioned Judge of Weber County, State of Utah.

LAWRENCE A. VAN DYKE,
Clerk.

Mr. WILBUR.—I suppose it may be stipulated and understood that in place of reading this instrument or any other instrument introduced by either party, it may be read at any time by either party.

Mr. DEVINE.—That would certainly be true of the Articles of Incorporation.

Mr. WILBUR.—Calling your attention to the fact that Mr. Charles T. Early was one of the incorporators of the corporation, and the fact that the articles provide that the Board of Directors may appoint either a member of the board or any other person general manager of the corporation; that the duties of the general manager shall be to look after and superintend all of the affairs of the company, subject to such regulations as may be imposed by the directors.

Mr. DEVINE.—If you are going to read that portion of the articles, why don't you read that portion specifically appointing the general manager. [106]

Mr. WILBUR.—I am coming to that. You may read or either counsel may read any portion desired at any time. I will say to your Honor we are coming to a question here as to what is known as actual authority and apparent authority, and we expect to prove in this case, so that you may know what we will have, that Mr. Early was held up by the company in this State as the general manager of this company, and that Mr. Bates dealt with him as such. I would like to introduce now a certified copy from the officers of this State, showing the filing of the articles of incorporation in this state, so as to comply with the law, and this covers also the declaration of the purpose of that corporation to engage in business in the State of Oregon, and power of attorney executed by the Oregon-American Lumber Company under its seal and by its officers, David C. Eccles, President, Royal Eccles, Secretary, together

with the annual corporation report, showing that that company continued to comply with the law of the State of Oregon during the entire period mentioned in this complaint.

Mr. DEVINE.—It is admitted; that is not necessary.

Marked Plaintiff's Exhibit 2 and read: [107]

Plaintiff's Exhibit 2.

STATE OF OREGON.

CORPORATION DEPARTMENT.

I, W. E. Crews, Corporation Commissioner and Custodian of the Seal of the Corporation Department of the State of Oregon, DO HEREBY CERTIFY:

That I have carefully compared the annexed copy of articles of incorporation of Oregon-American Lumber Company with a certified copy of the articles of incorporation filed July 5, 1917; also the annexed copy of declaration of purpose to engage in business in the State of Oregon of said corporation with the original declaration of purpose filed July 5, 1917; also the annexed copy of power of attorney of said corporation with the original power of attorney filed July 5, 1917; also the annexed copy of information blank and affidavit of exemption of said corporation with the original information blank and affidavit of exemption filed August 28, 1917; also the annexed copies of annual reports for the fiscal years ending

June 30, 1918, June 30, 1919, and June 30, 1920, and June 30, 1921, with the original annual reports filed respectively September 23, 1918, July 11, 1919, June 18, 1920, and July 27, 1922; and find the same to be full, true and correct transcripts therefrom and of the whole thereof, together with all official endorsements thereon.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the seal of the Corporation Department of the State of Oregon.

Done at the Capitol, at Salem, Oregon, this 8th day of March, 1923.

W. E. CREWS,
Corporation Commissioner. [108]

STATE OF UTAH,
EXECUTIVE DEPARTMENT,

SECRETARY OF STATE'S OFFICE.

I, Harden Bennion, Secretary of State of the State of Utah, do hereby certify that the attached is a full, true and correct copy of the ARTICLES OF INCORPORATION OF THE

OREGON-AMERICAN LUMBER COMPANY,
as appears on record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Utah this 26th day of June, 1917.

[State Seal]

HARDEN BENNION,
Secretary of State.

By Jerrold R. Letcher,
Deputy.

United States of America,
State of Utah,
County of Weber,—ss.

I, C. M. Ramey, County Clerk in and for Weber County, in the State of Utah, do hereby certify that the incorporators of

OREGON-AMERICAN LUMBER COMPANY did on the 26th day of June, A. D. 1917, file in my office the Original Articles of Incorporation of said Corporation, duly acknowledged together with the oath of office of each director of said corporation, as is required by Sections 318 and 319 of Chapter 1, of Title 14, Compiled Laws of Utah, 1907;

AND I DO FURTHER CERTIFY, That the above and foregoing is a full, true and correct copy of said original Articles, deposited, filed and recorded in my office on said 26th day of June, A. D. 1917, as the same appears on file and of record.
[109]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this the 26th day of June, A. D. 1917.

[Seal]

Signed C. M. RAMEY,
County Clerk.

By Winnifred Geiger,
Deputy County Clerk.

(Filed in this the office of the Secretary of State of Utah on the 26th day of June, 1917.)

ARTICLES OF INCORPORATION

of the

OREGON-AMERICAN LUMBER COMPANY.

United States of America,
State of Utah,
County of Weber,—ss.

WHEREAS, the undersigned, whose full name and places of residence are

David C. Eccles, Ogden, Weber County, Utah.

M. S. Browning, Ogden, Weber County, Utah.

Joseph Scowcroft, Ogden, Weber County, Utah.

Royal Eccles, Ogden, Weber County, Utah.

L. R. Eccles, Ogden, Weber County, Utah.

Charles T. Early, Baker, Baker County, Oregon,
are desirous of associating themselves together for the purpose of forming a corporation under the laws of the State of Utah, have, for this purpose, adopted, and do hereby adopt, certify, agree and declare the following to be their Articles of Incorporation and Agreement, to wit:

Article 1.

The name of the corporation hereby formed shall be "Oregon-American Lumber Company," and is organized at Ogden City, Weber County, State of Utah.

Article 2.

The corporation shall exist for one hundred years unless sooner dissolved according to law. [110]

Article 3.

The object, business and pursuit of the corporation hereby created is and shall be:

A. To conduct, pursue and carry on the business of owning and operating saw mills, flumes, shingle mills, *planing* mills, and all kinds of wood-working machinery;

B. To own, operate, sell and dispose of lumber yards;

C. To buy, sell and manufacture lumber, lath. shingles, sash, doors, boxes and all other products manufactured from lumber;

D. To own, operate, manufacture generally, store, transmit, buy, sell and distribute electric current for heat, light and power. and to erect, buy, sell, lease and otherwise acquire, operate and maintain electric light, heating and power plants;

E. To purchase, own, acquire, encumber, sell and dispose of all kinds of real estate within or without the United States, either for the purpose of securing or supplying timber for the manufacture of lumber, or for the purpose of using such timber lands (when cleared) or other lands for agricultural purposes of all kinds;

F. To appropriate, acquire, own and use the waters of lakes and running streams for the development and furnishing of electrical power for any and all purposes;

G. To appropriate, acquire and own waters of lakes or running streams for the purpose of irrigation or supplying water for household or domestic construction, water livestock and for general irrigation purposes;

H. To own, acquire, construct, operate and maintain irrigation streams, or other water ways, for the

generation of electrical and other power for general sale and distribution, and for the operation of mills, lighting, heating and power plants, and for the general distribution of water, for sale and rental, for [111] irrigation, domestic and live stock purposes, and for the purpose of irrigating lands belonging to this Company and other individuals or concerns. and to dispose of any part or parts of such irrigation and power systems or *or* water rights in such manner as the Board of Directors may from time to time determine;

I. To buy, sell, lease, distribute, or otherwise dispose of water and water rights;

J. To build transmission lines for light, heat, power, telephone, or telegraph purposes, and to acquire, buy, own or sell franchises or rights of way for any of the purposes herein mentioned;

K. To locate, enter upon, pre-empt, or otherwise acquire, in lawful manner, any of the public domain of the United States or any foreign country;

L. To own, handle and control letters patent and inventions, and shares of its own capital stock and that of other corporations, and to vote any other stock owned by the same, as a natural person might do;

M. To issue bonds, notes, debentures and other evidences of indebtedness, and secure the payment of the same by mortgage, deed of trust or otherwise;

N. To carry on any or all of the following businesses, namely: Builders, contractors, decorators, merchants and dealers in stone, lime, brick, timber,

hardware or other building requisites, brick and tile, terra cotta makers, job masters, carriers, licensed victualers and house agents;

O. To own, lease and operate tram roads, railroads, or other roads and steamboats and barges for the transportation of any commodities manufactured or produced by the Company, or to convey any raw material to the mills or factories owned or [112] operated by the Company; also side boons and pocket boons and shear boons at and near said mills for the purpose of catching and holding logs and other timber to be used and manufactured at said mills;

P. To lend money, either with or without security, and generally to such persons and upon such terms and conditions as the Company may think fit;

Q. And in general to do and perform such acts and things and transact such business, not inconsistent with the law in any part of the world, as the Board of Directors may deem to the advantage of the corporation, whether such branches of business are specifically mentioned herein or not.

R. The foregoing clauses shall be construed both as objects and powers, but no recitation, expression or declaration of specific or special powers or purposes herein enumerated shall be deemed to be exclusive; but it is hereby expressly declared that all other lawful powers not inconsistent therewith are hereby included.

Article 4.

The general office of the corporation shall be at Ogden City, Weber County, Utah, but places of

business and branch offices for conducting and carrying on any portion of the business may be established at any other place or places.

Article 5.

The amount of the capital stock of the corporation shall be Three Million, Five Hundred Thousand (\$3,500,000.00) Dollars, divided into thirty-five thousand (35,000) shares of the par value of One Hundred (\$100.00) Dollars each.

Article 6.

The amount of capital stock subscribed and taken by each of the incorporators, parties hereto, is as follows: [113]

Name.	No. of Shares.
David C. Eccles.....	1,000
M. S. Browning.....	1,000
Joseph Scowcroft.....	500
Royal Eccles.....	500
L. R. Eccles.....	500
Charles T. Early.....	500
David C. Eccles, Trustee.....	31,000

Article 7.

The number and kind of officers of the corporation shall be as follows:

A Board of five (5) Directors, one of whom shall be President; one of whom shall be Vice-President of the corporation, and one may be Treasurer of the corporation and one may be Secretary of the corporation, provided, however, that the Secretary may, but need not, be a Director or stockholder of the corporation; and provided further that the

treasurer may, but need not, be a member of the Board of Directors of the corporation; provided also that the office of Treasurer may be held by the President or any Vice-President of the corporation, or by the Secretary when the Secretary is a stockholder of the corporation.

Each person to be eligible to election as a Director must be the owner and holder, in his own name, of at least one share of the capital stock, as shown by the books of the Company.

Three members of the entire Board of Directors shall be necessary to form a quorum, and be authorized to transact the business and exercise the corporate powers of the corporation.

The Board of Directors may appoint one of their own number, or any other person, General Manager of the corporation, and the duties of the General Manager shall be to look after and superintend all of the affairs of the Company, and, subject to such regulations as may be imposed by the Board of Directors, to employ all assistance and labor necessary therefor, contract [114] for the compensation of all employees, and discharge any person so employed. The General Manager shall make report to the Board of Directors annually, or oftener if required so to do, setting forth in detail the results of operations under his charge, together with any suggestions looking to the improvement and betterment of the conditions of the company, and to perform such other duties as the Board of Directors shall require.

Article 8.

Within five days after the election of a Board of Directors, they shall hold a Directors' Meeting and elect a President, a Vice-President, a Secretary and a Treasurer.

Article 9.

(a) There shall be an annual meeting of the stockholders held at the office of the corporation in Ogden City, Weber County, Utah, on the second Tuesday after the first Monday in January, 1918, and on the second Tuesday after the first Monday in January in each year thereafter, at such hour as the President or the Board of Directors may determine, for the purpose of electing a Board of five (5) Directors, and transacting such other business as may be necessary or convenient for the welfare of the corporation.

(b) The Board of Directors may direct the calling of special meetings of the stockholders at such time as they may deem necessary; and at all such meetings of the stockholders, whether annual or special, a representation of a majority of the capital stock of the corporation shall be necessary for the transaction of business; and no business, except to adjourn, or to adjourn to a specified time, shall be transacted at any meeting of the stockholders unless a majority of the capital stock is represented. [115]

(c) The officers of the corporation shall be elected by ballot, and the person having a majority of votes cast shall be deemed and declared duly elected. Each stockholder shall be entitled to as many votes as he holds shares of the capital stock, and repre-

sentation by proxy, duly appointed, in writing, shall be allowed at all meetings of the stockholders, whether annual or special.

(d) The failure to hold any annual or special meeting of the stockholders on the day or at the time appointed for the same shall not forfeit or interfere in any way with the corporate rights acquired under this agreement, and any such meeting may be held at any subsequent time, upon giving ten days' notice thereof, by publication in a daily newspaper published in Ogden City, Weber County, Utah.

The Secretary shall, and in case of his failure, any other officer of the corporation may give ten days' notice of all annual or special meetings of the stockholders, by publication, as aforesaid. The notice must specify the purpose or purposes for which any such meeting is called. Notice of all annual or special stockholders' meetings may be served by the Secretary or other officer as the case may be, by delivering a copy to each stockholder, personally, or by depositing notice thereof in the United States Post Office, at Ogden, Utah, with postage prepaid thereon, at least ten days prior to the date of such meeting, addressed to the addresses of the stockholders; which delivery of such notice, or the posting thereof as aforesaid, shall have the same effect as the publication thereof as aforesaid.

Article 10.

The term of office of all officers, except as provided in Article 11, shall be one year, and until their successors are elected and qualified. [116]

Article 11.

Until the annual meeting of the Stockholders, to be held on the second Tuesday after the first Monday in January, 1918, and the election and qualification thereafter of a Board of Directors, the following named persons shall be the directors of this corporation, to wit:

David C. Eccles, M. S. Browning, Joseph Scowcroft, Royal Eccles, and Charles T. Early. And the said David C. Eccles shall be President, and the said Charles T. Early shall be Vice-President, and the said M. S. Browning shall be Treasurer, and the said Royal Eccles shall be Secretary of the corporation, and the said David C. Eccles shall also be General Manager of the corporation.

Article 12.

The Board of Directors may hold meetings at the general office of the Company in Ogden City, Weber County, Utah, or at any other place of business of said corporation within the State of Utah.

The Board of Directors may fill vacancies occurring in the Board or any of the offices of the corporation until the next annual meeting for the election of officers.

Article 13.

The Board of Directors may enact by-laws for the conduct, regulation and management of the affairs of the corporation, and may change the same at pleasure.

Article 14.

Any officer of the corporation may be removed for

conduct prejudicial to the interest of the corporation by a majority vote of the stockholders.

Article 15.

Any officer of the corporation may resign his office [117] by giving the Board of Directors thirty days' notice thereof, in writing, before the same is to take effect, but such resignation may be accepted on shorter notice.

Article 16.

The private property of the stockholders shall not be liable for the debts, obligations or liabilities of the corporation.

Article 17.

The capital stock of this corporation, when issued, shall be fully paid and nonassessable.

Article 18.

The title to all property, real and personal, acquired by the corporation shall be vested in the corporation.

IN WITNESS WHEREOF the parties hereto have hereunto subscribed their names this 20th day of June, A. D. 1917.

DAVID C. ECCLES,
By ROYAL ECCLES,
M. S. BROWNING,
JOSEPH SCOWCROFT,
By ROYAL ECCLES,
ROYAL ECCLES,
CHARLES T. EARLY,
By J. H. DEVINE,
L. R. ECCLES.

State of Utah,
County of Weber,—ss.

M. S. Browning, Royal Eccles and L. R. Eccles, three of the parties to the foregoing Articles of Agreement for the incorporation of the Oregon-American Lumber Company, being duly sworn each for himself, and not one for the other, says: [118]

I am one of the persons named in the foregoing Articles of Agreement for the incorporation of the Oregon-American Lumber Company, that it is the *bona fide* intention of said incorporators to commence and carry on the business mentioned in this agreement; and that I verily believe that each party to said agreement has paid in full for the amount of capital stock in said corporation subscribed for by him, and that all the stock subscribed for by each stockholder has been paid, and that more than one-third of the authorized capital stock of the corporation has been fully paid before the signing of these Articles of Incorporation.

M. S. BROWNING.

ROYAL ECCLES.

L. R. ECCLES.

Subscribed and sworn to before me this 23d day of June, 1917.

My Commission expires January 20, 1918.

J. H. DEVINE,

Notary Public.

State of Utah,
County of Weber,—ss.

On the 23d day of June, 1917, before me, the undersigned Notary Public in and for said County and State, personally appeared M. S. Browning, L. R. Eccles and Royal Eccles, three of the persons whose names are subscribed to the foregoing Articles of Incorporation as parties thereto, personally known to me to be the persons named therein, and who executed the Agreement as parties thereto, and they, and each of them, then and there severally duly acknowledged to me that they and their associates executed the same, freely and voluntarily, and for the uses and purposes therein mentioned. [119]

WITNESS my hand and notarial seal, at Ogden City, Utah, the day and year herein first above written.

My Commission expires January 20, 1918.

[Seal]

J. H. DEVINE,
Notary Public.

[Endorsed]: F-1296. Certified copy of Articles of Incorporation of the Oregon-American Lumber Company. Filed in the office of the Corporation Commissioner of the State of Oregon at 4:30 o'clock P. M., the 5th day of July, 1917.

H. J. SCHULDERMAN,
Corporation Commissioner.

DECLARATION OF PURPOSE TO ENGAGE
IN BUSINESS IN THE STATE OF
OREGON.

Know all Men by these Presents, That the Oregon-American Lumber Company, a corporation organized and existing under and pursuant to the laws of the State of Utah, having its principal office in the David Eccles Building in the City of Ogden, County of Weber and State of Utah, hereby makes the following declaration of its desire and purpose to engage in business within the State of Oregon, which declaration is accompanied by a duly authenticated copy of its Articles of Incorporation, in compliance with the provisions of "An Act to provide for the licensing of domestic corporations and foreign corporations, joint stock companies, and associations, etc.," approved February 16, 1903:

The full name under which it proposed to transact business is Oregon-American Lumber Company.

The name of the state or country under whose laws [120] it was organized in Utah.

The location of its home office is in the David Eccles Building, Ogden City, Weber County and State of Utah.

The date of its formation or incorporation was the 26th day of June, A. D. 1917.

The amount of its capital stock is Three Million Five Hundred Thousand (\$3,500,000.00) Dollars.

The nature of the pursuit, business, or occupation in which it is authorized to engage is:

A. To conduct, pursue and carry on the business of owning and operating sawmills, flumes,

shingle mills, *plaining* mills and all kinds of wood working machinery;

B. To own, operate, sell and dispose of lumber yards;

C. To buy, sell and manufacture lumber, lath, shingles, sash, doors, boxes and all other products manufactured from lumber;

D. To own, operate, manufacture generally, store, transmit, buy, sell and distribute electric current for heat, light and power, and to erect, buy, sell, lease and otherwise acquire, operate and maintain electric light, heating and power plants;

E. To purchase, own, acquire, encumber, sell and dispose of all kinds of real estate within or without the United States, either for the purpose of securing or supplying timber for the manufacture of lumber, or for the purpose of using such timber-lands (when cleared) or other lands for agricultural purposes of all kinds;

F. To appropriate, acquire, own and use the waters of lakes and running streams for the development and furnishing of electrical power for any and all purposes;

G. To appropriate, acquire and own waters of lakes or running streams for the purpose of irrigation or supplying water for [121] household or domestic construction, watering livestock and for general irrigation purposes;

H. To own, acquire, construct, operate and maintain irrigation streams, or other water ways, for the generation of electrical and other power

for general sale and distribution, and for the operation of mills, lighting, heating and power plants, and for the general distribution of water, for sale and rental, for irrigation, domestic and livestock purposes, and for the purpose of irrigating lands belonging to this company and other individuals, or concerns, and to dispose of any part or parts of such irrigation and power systems or water rights in such manner as the Board of Directors may from time to time determine;

I. To buy, sell, lease, distribute, or otherwise dispose of water and water rights;

J. To build transmission lines for light, heat, power, telephone or telegraph purposes, and to acquire, buy, own or sell franchises or rights of way for any of the purposes herein mentioned;

K. To locate, enter upon, pre-empt, or otherwise acquire, in lawful manner, any of the public domain of the United States or any foreign country;

L. To own, handle and control letters patent and inventions, and shares of its own capital stock and that of other corporations, and to vote any other stock owned by the same, as a natural person might do;

M. To issue bonds, notes, debentures and other evidences of indebtedness, and secure payment of the same by mortgage, deed of trust or otherwise;

N. To carry on any or all of the following businesses, namely; builders, contractors, decorators, merchants and dealers [122] in stone, lime, brick, timber, hardware or other building requi-

sites, brick and tile, terra cotta makers, job masters, carriers, licensed victualers and house agents.

O. To own, lease and operate tram roads, railroads, or other roads and steamboats and barges for the transportation of any commodities manufactured or produced by the company, or to convey any raw material to the mills or factories owned or operated by the Company; also side boons and pocket boons and shear boons at and near said mills for the purpose of catching and holding logs and other timber to be used and manufactured at said mills.

P. To lend money, either with or without security, and generally to such persons and upon such terms and conditions as the company may think fit;

Q. And in general to do and perform such acts and things and transact such business, not inconsistent with the law in any part of the world, as the Board of Directors may deem to the advantage of the corporation, whether such branches of business are specifically mentioned herein or not.

R. The foregoing causes shall be construed both as objects and powers, but no recitation, expression or declaration of specific or special powers or purposes herein enumerated shall be deemed to be exclusive; but it is hereby expressly declared that all other lawful powers not inconsistent therewith are hereby included.

The location of the principal office within the State of Oregon is No. 830 Northwestern Bank

Building, in the City of Portland, and County of Multnomah.

The name of its attorney in fact, constituted and appointed in accordance with the provisions of Section 6 of "An Act to provide for the licensing of domestic corporations and foreign corporations, joint stock companies, and associations, [123] etc.," approved February 16, 1903, is Charles T. Early, whose business address is No. 830 Northwestern Bank Building, in the City of Portland, County of Multnomah and State of Oregon.

The names and addresses of its principal officers, and of its directors or trustees, are as follows:

Name	Office	Postoffice Address
David C. Eccles	Director & President	David Eccles Building, Ogden, Utah.
Charles T. Early	Director and Vice-president	830 Northwestern Bank Bldg., Portland, Oregon.
M. S. Browning	Director and Treasurer	David Eccles Bldg., Ogden, Utah.
Royal Eccles	Director and Secretary	David Eccles Bldg., Ogden, Utah.
Joseph Scowcroft	Director	23rd Street and Wall Ave., Ogden, Utah.

The name and residence of its general agent within the State of Oregon is Charles T. Early, Portland, in the County of Multnomah.

IN WITNESS WHEREOF, said corporation, in pursuance of a resolution duly adopted by its Board of Directors has caused this declaration to be signed by its President and Secretary and its corporate seal to be affixed the 30th day of June, A. D. 1917.

[Corporate Seal]

OREGON-AMERICAN LUMBER CO.

DAVID C. ECCLES, [Seal]
President.

ROYAL ECCLES, [Seal]
Secretary.

State of Utah,
County of Weber,—ss.

I, David C. Eccles, President, and I, Royal Eccles, secretary of the Oregon-American Lumber Company, being severally duly sworn depose and say, and each for himself says, that I am [124] President and Secretary, respectively, of the Oregon-American Lumber Company, the corporation mentioned in, and which executed the foregoing declaration, and that said declaration is a full, true and correct statement of the matters therein contained according to the best of my information, knowledge and belief.

DAVID C. ECCLES.

ROYAL ECCLES.

Subscribed and sworn to before me this 30th day of June, 1917.

My Commission expires January 14, 1918.

[Seal]

J. H. DEVINE,

Notary Public in and for the County of Weber,
State of Utah.

State of Utah,

County of Weber,—ss.

I, Royal Eccles, Secretary of the Oregon-American Lumber Company, being first duly sworn depose and say upon oath that David C. Eccles is the President of said corporation and that the signature affixed to the above and foregoing declaration is the genuine signature of the said David C. Eccles; that the corporate seal hereinbefore attached and impressed herein is the corporate seal of said corporation, and was affixed thereto by me, and that the foregoing declaration was executed for the Oregon-American Lumber Company by its President and Secretary, pursuant to a resolution of the Board of Directors of said corporation duly adopted on the 27th day of June, A. D. 1917, so help me God.

ROYAL ECCLES.

Subscribed and sworn to before me this 30th day of June, 1917.

My Commission expires January 14, 1918.

[Notarial Seal]

J. H. DEVINE,

Notary Public in and for Weber County, State of
Utah. [125]

[Endorsed]: F-1296. Declaration of the Oregon-American Lumber Company. Filed in the office of the Corporation Commissioner of the State of Oregon at 4:30 o'clock P. M. the 5th day of July, 1917.

H. J. SCHULDERMAN,
Corporation Commissioner.

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS:

That the Oregon-American Lumber Company is a corporation duly organized under and by virtue of the laws of the state of Utah, having its principal place of business in the City of Portland, County of Multnomah and State of Oregon.

That the said Oregon-American Lumber Company has made, constituted and appointed, and does hereby make, constitute and appoint Charles T. Early, a citizen of the United States and a citizen and resident of the State of Oregon, its true and lawful attorney in fact, and authorized agent for it, and in its name, place and stead to make and accept service of all writs, processes and summonses in any action, suit or proceeding in any of the Courts of the State of Oregon or the United States Courts therein, and upon whom all lawful writs, processes and summonses may be served with the same effect as though the Company existed in the State of Oregon, requisite and necessary to give competent and complete jurisdiction of the said Oregon-American Lumber Company to any of the said Courts giving and granting unto the said Charles T. Early full power and authority

to do and perform every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the said Oregon-American Lumber Company might or could do if personally present, hereby ratifying [126] and confirming all that the said Charles T. Early shall lawfully do or cause to be done by authority thereof.

This power of attorney is irrevocable except by the substitution of another qualified person for the one hereby appointed attorney in fact.

IN WITNESS WHEREOF, said corporation, in pursuance of a resolution duly adopted by its Board of Directors has caused this instrument to be executed in its name by its President and Secretary, and its corporate seal to be hereto affixed the 30th day of June, A. D. 1917.

OREGON-AMERICAN LUMBER CO.

By DAVID C. ECCLES, [Seal]

President.

By ROYAL ECCLES, [Seal]

Secretary.

State of Utah,
County of Weber,—ss.

This certifies, that on this 28th day of June, A. D. 1917, before the undersigned, a notary public, in and for Weber County, State of Utah, personally appeared the within named David C. Eccles, the President, and Royal Eccles, the Secretary of the Oregon-American Lumber Company, the corporation mentioned in and which executed the foregoing power of attorney, and acknowledged

that they executed the same by the authority and on behalf of said Oregon-American Lumber Company.

The Secretary of said Oregon-American Lumber Company further acknowledged that the corporate seal hereinbefore attached and impressed herein is the corporate seal of said corporation and was affixed thereto by him.

In testimony whereof, I have hereunto set my hand and seal this 30th day of June, A. D. 1917.
[127]

My Commission expires January 14, 1918.

[Seal]

J. H. DEVINE,

Notary Public in and for Weber County, State of Utah.

[Endorsed] F-1296. Power of Attorney of the Oregon-American Lumber Company. Filed in the office of the Corporation Commissioner of the State of Oregon at 4:30 o'clock P. M., the 5th day of July, 1917.

H. J. SCHULDERMAN,
Corporation Commissioner.

INFORMATION BLANK.

Foreign Corporation.

For the Corporation Department of the State of Oregon.

1. Full name of company Oregon-American Lumber Company, a foreign corporation, organized and existing under and pursuant to the laws of Utah.

2. Name of attorney in fact in Oregon, CHAS.

T. EARLY. Address: 830 Northwest Bank, Portland, Oregon.

3. When declaration to engage in business within the State of Oregon filed? July 5th, 1917.

4. The nature and general plan of the business to be followed in Oregon. To do a general lumbering business and anything connected therewith.

5. The authorized capital stock, \$3,500,000; consisting of 35,000 shares, par value \$100.00 each.

6. The amount thereof subscribed at time of filing declaration to engage in business within the State of Oregon \$3,500,000; the amount remaining unsubscribed \$ none.

7. Will any of the above stock be for sale by the company within [128] this state? No.

8. Mention what, if any, stock, bonds, notes, contracts or other securities are to be issued by the company within this state — purchase Price
(If none please so state)

Mortgage.

.....
9. The officers and directors, and their addresses, are as follows:

David C. Eccles, President, Ogden, Utah.

Chas. T. Early, Vice-Pres., Portland, Oregon.

Royal Eccles, Secretary, Ogden, Utah.

M. S. Browning, Treasurer, Ogden, Utah.

L. R. Eccles, Director, Ogden, Utah.

Joseph Scowcroft, Director, Ogden, Utah.

DAVID C. ECCLES,
President.

ROYAL ECCLES,
Secretary.

July 11th, 1917.

Kindly fill out the above, signed by two of the principal officers of the company, and return at once to the Corporation Commissioner. No fee is required for this blank; if the corporation is a close corporation, and no securities are to be issued of any kind whatsoever to any one within the State of Oregon, the following should be executed also:

AFFIDAVIT OF EXEMPTION.

State of Utah.

County of Weber,—ss.

I, David C. Eccles, and I, Royal Eccles, being first duly sworn, depose and say:

That I, David C. Eccles, am the duly elected, qualified and acting President, and that I, Royal Eccles, am the duly elected, qualified and acting Secretary of Oregon-American Lumber Company _____ a corporation formed under and by virtue of the laws of _____ (Name of company or corporation)

_____; that I am fully conversant with, and qualified and authorized to speak of the affairs of the said corporation; that the said corporation does not intend to deal in any stocks, bonds, notes, contracts, or other securities, covered by Chapter II, Title XXXIC, Oregon Laws, as amended by Chapters 168 and 400, General Laws of Oregon for 1921, within the State of Oregon, underwriting or purchasing such securities and reselling to any person or persons within the State of Oregon; that the said corporation does not now come under and within [129] the definition,

scope or practice of a dealer as defined and set out in said chapter.

That no stocks, bonds, notes, contracts, or other corporate securities of this corporation will be sold, transferred or issued to any person, copartnership or corporation, within the State of Oregon, without first having obtained from the Corporation Commissioner a permit to do so; provided, this affidavit shall in no way prejudice any sale, by the *bona fide* owner of such corporate securities, not made in the course of repeated and continuing transactions of a similar nature.

[Corporate Seal]

DAVID C. ECCLES,

President.

ROYAL ECCLES,

Secretary.

Subscribed and sworn to before me by the said David C. Eccles and the said Royal Eccles above named, on this 24th day of August, 1917, at Ogden, Utah.

[Notarial Seal]

H. M. MONSON,

Notary Public for Weber County.

My Commission expires December 2d, 1920.

Annual Report—Foreign Corporation.

Note—This report must be filed on or before July 1. If incomplete or irregular, it cannot be accepted, and will be returned for correction.

“Every foreign corporation, joint stock company, or association, now doing business in this state, or that may hereafter do business in this state, except fire, marine, fire and marine, life, accident,

life and accident, plate glass and steam boiler insurance companies, and casualty and surety companies, shall between July 1 and August 15 of each year, pay in advance to the Corporation Department of this state an annual license fee of \$200.00.”
—Section 6884, Oregon Laws.

ANNUAL REPORT TO THE CORPORATION
DEPARTMENT.

(In compliance with Section 6883, Oregon Laws.)

For the year ending June 30, 1918.

Of Oregon-American Lumber Company, a corporation
(Give legal name in full)
organized and existing under and pursuant
to the laws of Utah.

(State or County)

The location of its principal office is at No. —
Eccles Building, — Street in the City of Ogden,
in the State or County of Utah.

The name of the president, secretary and treasurer, the attorney in fact and managing agent in the State of Oregon, with the Postoffice address of each are as follows: [130]

Name	Office	Business
D. C. Eccles	President	Ogden, Utah.
Royal Eccles	Secretary	Ogden, Utah.
M. S. Browning	Treasurer	Ogden, Utah.
C. T. Early	Attorney in fact	Portland, Oregon.
C. T. Early	Managing Agent	Portland, Oregon.

The date of the annual election of directors and officers is the 2d Tuesday after the 1st Monday in January.

Amount of authorized capital stock.	\$3,500,000.00
Number of shares of capital stock.	35,000
Par value of each share.....	\$100.00
Amount of capital stock subscribed.	\$3,500,000.00
Amount of capital stock issued.....	\$3,500,000.00
Amount of capital stock paid.....	\$3,500,000.00

In witness whereof, I, Royal Eccles, Secretary
 (Name) (Official title)
 of said corporation, have signed this report, this
 15th day of August, A. D. 1918.

ROYAL ECCLES.

State of Utah,
 County of Weber,—ss.

I, Royal Eccles, being first duly sworn, depose
 and say, upon oath, that I am Secretary of the
 foregoing corporation, and that the above state-
 ment is a full, true and correct statement of the
 matters therein contained, according to the best of
 my information, knowledge and belief.

ROYAL ECCLES.

Subscribed and sworn to before me this 15th day
 of August, A. D. 1918.

[Notarial Seal] JED BALLANTYNE,
 (Utah) Notary Public for *Oregon*.

My Commission expires April 16, 1920.

Annual Report—Foreign Corporation.

Note—This report must be filed on or before
 July 1. If incomplete or irregular, it cannot be
 accepted, and will be returned for correction.

“Every foreign corporation, joint stock com-
 pany, or association, now doing business in this

state, or that may hereafter do business in this state, except fire, marine, fire and marine, life, accident, life and accident, plate glass and steam boiler insurance companies, and casualty and surety companies, shall, between July 1 and August 15 of each year, pay in advance to the Corporation Department of this state an annual license fee of \$200.00."—Section 6884, Oregon Laws. [131]

ANNUAL REPORT TO THE CORPORATION
DEPARTMENT (In compliance with Section
6883, Oregon Laws) FOR THE YEAR END-
ING JUNE 30, 1919.

Of Oregon-American Lumber Company a corpo-
(Give legal name in full)
ration organized and existing under and pursuant
to the laws of Utah

(State or County)

The location of its principal office is at
No. 621 David Eccles Building in the City
of Ogden, in the state or county of Weber Co.,
Utah.

The names of the president, secretary and
treasurer, the attorney in fact and managing agent
in the State of Oregon, with the postoffice address
of each are as follows:

Name	Office	Business Address
David C. Eccles	President	621 David Eccles Bldg., Ogden, Utah.
Royal Eccles	Secretary	" " " "
Royal Eccles	Treasurer	" " " "
.....	Attorney in fact
Chas. T. Early	Managing Agent	Northwestern Natl. Bank Bldg., Portland, Ore.

The date of the annual election of directors and officers is Jan. 14, 1919.

Amount of authorized capital stock \$3,500,000.00

Number of shares of capital stock 35,000

Par value of each share \$100.00

Amount of capital stock subscribed \$3,500,000.00

Amount of capital stock issued \$3,500,000.00

Amount of capital stock paid up \$3,500,000.00

In witness whereof, I, Royal Eccles, Secretary

(Name) (Official title)

of said corporation, have signed this report, this 8 day of July, A. D. 1919.

ROYAL ECCLES.

State of Utah,

County of Weber,—ss.

I, Royal Eccles, being first duly sworn, depose and say, upon oath, that I am Secretary of the foregoing corporation, and that the above statement is a full, true and correct statement of the matters therein contained, according to the best of my information, knowledge and belief.

ROYAL ECCLES.

Subscribed and sworn to before me this 8 day of July, A. D. 1919.

[Notarial Seal]

JED BALLANTYNE,

Notary Public for Utah.

My Commission expires April 16, 1920. [132]

In the District Court of the United States for the
District of Oregon.

Annual Report—Foreign Corporation.

Note—This report must be filed on or before July

1. If incomplete or irregular, it cannot be accepted, and will be returned for correction.

“Every foreign corporation, joint stock company, or association, now doing business in this state, or that may hereafter do business in this state, except fire, marine, fire and marine, life, accident, life and accident, plate glass and steam boiler insurance companies, and casualty and surety companies, shall, between July 1 and August 15 of each year, pay in advance To the Corporation Department of this State An Annual License Fee of \$200.00.” — Chapter 381, Laws of 1913, as amended by Chapter 179, Laws 1919.

ANNUAL REPORT TO THE CORPORATION
DEPARTMENT (In compliance with Section
6707, Lord's Oregon Laws) FOR THE YEAR
ENDING JUNE 30, 1920.

Of Oregon-American Lumber Company a corpo-
(Give legal name in full)
ration organized and existing under and pursuant
to the laws of Utah

(State or county)

The location of its principal office is at No. 621
David Eccles Building in the City of Ogden, in the
state or county of Utah.

The names of the president, secretary and treas-
urer, the attorney in fact and managing agent in

the state of Oregon, with the postoffice address of each are as follows:

Names	Office	Business Address
David C. Eccles	President	621 David Eccles Bldg., Ogden, Utah.
Royal Eccles	Secretary	621 David Eccles Bldg., Ogden, Utah.
Royal Eccles	Treasurer	621 David Eccles Bldg., Ogden, Utah.

(Attorney in Fact)

Chas. T. Early (Managing Agent) 1011 Yeon Bldg.,
Portland, Ore.

The date of the annual election of directors and officers is

Amount of authorized capital stock \$3,500,000.00

Number of shares of capital stock 35,000

Par value of each share \$100.00

Amount of capital stock subscribed \$3,500,000.00

Amount of capital stock issued \$3,500,000.00

Amount of capital stock paid up \$3,500,000.00

In witness whereof, I, Royal Eccles, Secretary

(Official Title)

of said corporation, have signed this report, this
9th day of June, A. D. 1920.

ROYAL ECCLES,

Secretary. [133]

State of Utah,

County of Weber,—ss.

I, Royal Eccles, being first duly sworn, depose and say, upon oath, that I am secretary of the foregoing corporation, and that the above statement is a full, true and correct statement of the matters

therein contained, according to the best of my information, knowledge and belief.

ROYAL ECCLES,
Secretary.

Subscribed and sworn to before me this 9th day of June, A. D. 1920.

[Notarial Seal]

H. M. MONSON,
Notary Public for Utah.

My Commission expires Dec. 2, 1920.

Annual Report—Foreign Corporation.

Note—This report must be filed on or before July 1. If incomplete or irregular, it can not be accepted, and will be returned for correction.

“Every foreign corporation, joint stock company, or association, now doing business in this state, or that may hereafter do business in this state, except fire, marine, fire and marine, life, accident, life and accident, plate glass and steam boiler insurance companies, and casualty and surety companies, shall, between July 1 and August 15 of each year, pay in advance to the Corporation Department of this State an annual license fee of \$200.00.” Section 6884, Oregon Laws.

ANNUAL REPORT TO THE CORPORATION
DEPARTMENT (In compliance with Section
6883, Oregon Laws) FOR THE YEAR END-
ING JUNE 30, 1921.

Of Oregon-American Lumber Company a corpo-
(Give legal name in full)

ration organized and existing under and pursuant
to the laws of Utah

(State or county)

The location of its principal office is at No. 508 Platt Building, in the City of Portland, in the state or county of Oregon.

The names of the president, secretary and treasurer, the attorney in fact and managing agent in the State of Oregon, with the postoffice address of each are as follows:

Names	Office	Business Address
Chas. S. Keith	President	Keith & Perry Bldg., Kansas City, Mo.
J. E. Broughal	Secretary	" " "
J. E. Broughal	Treasurer	" " "
Jas. G. Wilson	Attorney in Fact	508 Platt Bldg., Portland, Ore.
J. F. Cooper	Managing Agent	1017 Yeon Bldg., Portland, Ore.

The date of the annual election of directors and officers is 2d Tuesday after 1st Monday in January each year. [134]

Amount of authorized capital stock \$3,500,000.00

Number of shares of capital stock authorized 35,000

Par value of each share \$100.00

Amount of capital stock subscribed \$1,577,500.00

Amount of capital stock issued \$1,577,500.00

Amount of capital stock paid up \$1,577,500.00

In Witness Whereof, I, J. E. Broughal,
(Name)

Secretary-Treasurer of said corporation, have
(Official title)

signed this report, this 24th day of July, A. D. 1922.

J. E. BROUGHAL,
Secretary-Treasurer.

(Testimony of Charles T. Early.)

State of Missouri,
County of Jackson,—ss.

I, J. E. Broughal, being first duly sworn, depose and say, upon oath, that I am Secretary-Treasurer, of the foregoing corporation, and that the above statement is a full, true and correct statement of the matters therein contained, according to the best of my information, knowledge and belief.

J. E. BROUGHAL.

Subscribed and sworn to before me this 24th day of July, A. D. 1922.

[Notarial Seal] HARRIET P. McCAIN,
Notary Public for Jackson Co., Missouri.

My Commission expires —.

My Commission expires Jan. 8, 1924.

Mr. DEVINE.—If this is being offered for the purpose of showing the authority of Charles T. Early to make such general employment as is alleged in this complaint, the filing of the annual statement of the officers in statutory form in the State of Oregon, then we object as incompetent for that purpose.

Objection overruled; exception saved.

Q. From the time you went into this company in 1917, will you tell the jury what duties or acts you performed for this corporation with their knowledge and consent generally.

A. Well, immediately after the property was purchased, we sought the best methods of developing the property. The property was bought for devel-

(Testimony of Charles T. Early.)

opment and not for holding or for speculation. It [135] had no transportation and I think about the first thing that was done was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad.

Q. Who made those arrangements with Mr. Bates, did you or who was it? A. I did.

Mr. DEVINE.—I am going to object again, upon the ground that it is not the best evidence. There is no authority in this man to make any such arrangements.

COURT.—That is a question of proof. Depends upon what he did, I suppose, and how the company held him out. I don't know whether he had authority or not.

Exception saved.

Q. I am coming to that a little bit later. Did you attend meetings of the corporation in Salt Lake City or Ogden?

A. Not in the early history of the company.

Q. When did you attend meetings there?

A. I think it was in 1920. I am not certain that I ever attended a meeting before 1920.

Q. Were you in conference with the officers prior to that time? A. Yes, sir.

Q. What ones?

A. Well, particularly the President of the company, Mr. David C. Eccles.

Q. How often would you be in contact with Mr. Eccles?

A. Oh, he would come out and sometimes would

(Testimony of Charles T. Early.)

stay for a day or two, sometimes he would stay for a week.

Q. Was all the property of the corporation in timber holdings in this state?

A. I don't understand the question.

Q. Was all the timber holdings and property of that corporation in this state? A. Yes, sir. [136]

Q. As far as you know, did any other officers of this corporation or director live in the state besides yourself? A. No, sir.

Q. Who handled here the business of this company in the handling and operation of the property?

A. I did.

Q. I wish you would state—the Court has said that what it wants to know and what the jury wants to know, is what you did, Mr. Early, in your capacity in reference to the Oregon-American Lumber Company. Can't you tell just exactly what you did?

A. Yes, there wasn't a great deal done just at that time. I looked after the taxes, hired a tax agent and hired cruisers when it was necessary to hire them, and arranged for fire patrol.

Q. In hiring people here, state whether or not you did that yourself here on your own authority for this company?

A. I did all that I have stated, yes, sir.

Q. Now the question you say of tax agent, what was that?

A. Well, we hired a man by the name of Mr. Starr, C. L. Starr, to look after our taxes in the

(Testimony of Charles T. Early.)

various counties. He represents most of the timber holders on the coast here, a very good man, and he had plenty of time to do it and I didn't.

Q. Now, what I want to get at, was he employed by you or was that referred to the company? Did you make that employment? A. I hired him.

Q. Did the company subsequently learn of that, or know of it, that you had hired Mr. Starr for tax matters?

A. Mr. Eccles knew of it. I don't know about the other people.

Q. State whether or not there was any objection.

A. No, sir.

Q. Mr. Starr was paid, was he? A. Yes, sir.

Q. By whom?

A. Undoubtedly by the Oregon-American Lumber Company.

Mr. DEVINE.—That is a conclusion.

COURT.—State what you know about it. [137]

A. Well, he was paid, not only by the Oregon-American Lumber Company, but other Eccles interests that he represented. He represented the Oregon Lumber Company, the Sumpter Valley Railway, and the Mt. Hood Railway.

Q. In handling their business, did you hire or employ attorneys at times?

A. Well, we used the same attorneys that we had had for twenty years or more. Any business we had we went to them.

Q. That is the same attorneys?

(Testimony of Charles T. Early.)

A. Huntington & Wilson.

Q. And any employment you had there for the Oregon-American Company, who made that employment or request for the attorneys?

A. Well, whatever business that came up that we had to consult an attorney, we took it there. I arranged with them as to fee.

Q. For the Oregon-American Lumber Company?

A. Yes, sir.

Q. State whether or not those were paid by the Oregon-American Lumber Company.

A. They undoubtedly were.

Q. Was any objection ever raised as far as that was concerned, to your handling that matter, employing attorneys to look after their affairs?

A. Not to my knowledge.

Q. Now, the question of any office help, or other things of that kind in handling their office here, who employed that help?

A. Well, I talked that over with the cashier, but he usually hired the help.

Q. But under whose general direction and supervision?

A. Well, under my supervision. If it was necessary to put on another man, or woman, why we discussed it and he was authorized to do it.

Q. Now, how many meetings did you attend, would you say, at Salt Lake or Ogden—where were those meetings held? A. Ogden.

Q. How many stockholders or directors' meetings did you attend? A. I think about four.

(Testimony of Charles T. Early.)

Q. All of them at Ogden?

A. All at Ogden, yes.

Q. Who were present at those meetings?

A. Well, I don't know as I could name everybody that was present.

Q. Well, do as well as you can.

A. There was Mr. DeVine.

Q. That is the gentleman sitting here?

A. Yes, sir. Mr. Browning, Mr. Royal Eccles, J. M. Eccles, Marrian Eccles, Joe Scowcroft and I think Mr. Wattles.

Q. What was it you said a moment ago about Mr. Eccles coming here occasionally?

A. Well, he resided in Ogden until recent years, and he would make trips here as often as he could and he would sometimes stay a day or two, and sometimes stayed a week, depending entirely upon what he had to do elsewhere.

Q. And Mr. Eccles, as I understand, was president of the company? A. Yes, sir.

Q. And in your work which you did here generally, and I am coming to it more specifically later, did you at those meetings or when you met Mr. Eccles here in Portland, and were with him from two days to a week on his visits—what was done about acquainting him with what you were doing here and how you were holding yourself out to the public?

Mr. DEVINE.—Objected to as calling for a conclusion of this witness, and assuming he ever did

(Testimony of Charles T. Early.)

state to Mr. Eccles how he was holding himself out to the public.

COURT.—Let him state, if he did, he can so say. Exception saved.

Mr. WILBUR.—Under the question of ratification by officers of the company.

Mr. DEVINE.—On that ground, if the Court will permit [139] me, I now object further upon the ground that Mr. Eccles had no such authority to bind the company to any ratification of the character here for the acts alleged as services in this complaint.

Objection overruled, exception saved.

A. Well, we discussed in a general way most everything that came up. I never told Mr. Eccles that I was holding myself out to the public as General Manager or anything else. That phase of it we never discussed, but I told him what I was doing. We were occupying our time, however, more particularly with operating properties here than we were with the Oregon-American Company.

Q. The idea being at that time not to dispose of your property but to develop to operate?

A. Yes, sir.

Q. And in the complaint in this case, which has been spoken of here, I believe you spoke of the McCormick matter, which you have talked with Mr. Bates about. Did you ever discuss that particular matter or phase with Mr. Eccles or the directors?

A. I discussed it with Mr. Eccles. In fact, we

(Testimony of Charles T. Early.)

were down there together with Mr. Eccles; made one or two trips.

Q. Then on this, which is known as the first item here, the McCormick and St. Helens matter, I understand you and Mr. Eccles, president of the company, and Mr. Bates went out on it?

A. Yes, sir.

Q. Do you know what was said to Mr. Eccles as the president of this company as to what was being done, or what Bates was doing? Or the relation between you and Bates?

A. Well, Mr. Eccles knew first, I think—

Mr. DEVINE.—Just a moment, I object to the statement of what Mr. Eccles knew.

COURT.—State what was said, not your conclusion.

Q. As near as you can, Mr. Early, what was said? I presume you [140] can't remember the exact language, etc., but they were objecting to it because it is a conclusion, but as to what was said in a general way with Mr. Eccles there, as to the relation of Mr. Bates?

A. Well, Mr. Bates was instructed to get an option on the McCormick—

Mr. DEVINE.—We object to that as being a conclusion. He was asked what was said, and we are entitled to know.

A. Well, I won't attempt, your Honor, to use the language, because I couldn't.

COURT.—You can state in substance what was said, not your conclusion.

(Testimony of Charles T. Early.)

A. I think that can be shown in writing better than anything that I might say.

Q. There is a technical objection made here that it is a conclusion as to what they understood, but you three men were out there on this matter, and what I want to know is as to any statement they may have made. While you can't remember the exact language, we all know that, as to what was—I was going to say understood, but that is a word I should not use—what was said there as to Mr. Bates and as to what he was to do there?

A. Well, he was directed to get this option and he did get it for a period of six months.

Q. Who was he directed by?

A. Mr. Eccles and I.

Q. Now, relative to the Coleman Wheeler deal, which has been referred to there, the traffic arrangement, was Mr. Eccles out in any of the deals connected with that, any of the trips connected with that?

A. I am not certain. I think he made one trip, but I would not be positive.

Q. Was he with Mr. Bates at that time, or do you know?

A. I think Mr. Bates was along. He was along at the time that I think Mr. Eccles was along. [141]

Q. Was there any statement or talk in any way between Mr. Eccles as the president of that company, who was here on a visit and yourself, as to the relation of Mr. Bates?

(Testimony of Charles T. Early.)

A. I don't remember any particular conversation. Mr. Bates was directed to—

Mr. DEVINE.—Just a moment, we object to what Mr. Bates was directed as a proposition coming from nobody in particular.

Q. I will ask you to build this up; in the first place, was Mr. Bates, as far as that matter was concerned, directed by you to do anything?

A. Yes, sir.

A. I will ask you whether or not Mr. Eccles knew or was informed of what you had directed Mr. Bates to do? A. He was.

Q. As to Mr. Bates, did Mr. Eccles at that time make any objection? A. He did not.

Q. To your authority or employment of him?

A. He did not.

Q. Coming then to the Portland & Southwestern Deal, which was referred to in this matter, did Mr. Bates receive any employment at that time?

A. Yes.

Q. From whom? A. From me.

Q. I wish you would state whether or not that was made known to Mr. Eccles or the officers of the corporation.

A. Yes, he knew of it.

Q. Did they make any objection to that?

A. They did not.

Q. Coming then to the Mitsui deal, did Mr. Bates have any employment at that time relative to this matter? A. Yes, sir.

Q. From whom? A. From me.

(Testimony of Charles T. Early.)

Q. Was any knowledge of that brought home to any of the officers of the Company? A. Yes, sir.

Q. Any objection made by the company in any way? A. No, sir.

Q. Relative to the United Railway deal, did Mr. Bates have any employment [142] in that matter from you? A. He did.

Q. From whom? A. From me.

Q. Was knowledge of that brought home to this company? A. It was.

Q. Were you three out on any trips in connection with that at any time? A. I think we—

Mr. DEVINE.—Just a moment, I want to object to that. I don't want to continually object. I am not objecting to leading questions being asked this witness, questions similar to the one just answered, was knowledge brought home to the company—yes, sir, it was, his answer. It seems to me that counsel ought to confine himself to a more specific question. We are not objecting to his leading questions for the reason we don't want to encumber the record.

Q. Well, coming to the Mitsui deal—counsel desires to have that more specific—what knowledge if any was brought home to this company of the fact that you had employed Mr. Bates?

A. That had to do with selling of some 6300 acres of stumpage combined with the Wheeler holdings. That transaction was brought about by my ascertaining through Mr. Dant of Dant & Russell, that the Mitsui people wanted an operating proposition. I had heard Mr. Bates say that he had had an

(Testimony of Charles T. Early.)

option on this property once before, and it was my suggestion that he get an option on the Wheeler holdings which weren't large enough. They didn't have timber enough to satisfy the Mitsui people and include the 6300 acres of Oregon-American timber in that sale to dispose of it.

Q. The point I am after now, what knowledge was brought home to the officers of the Oregon-American Lumber Company?

COURT.—Confine it to a particular officer.

A. Mr. David C. Eccles knew about it and gave the price \$3.00 per thousand, as I remember it.

Q. At which the— [143]

A. Oregon-American would dispose of their holdings.

Q. And what knowledge did Mr. Eccles have that Mr. Bates was doing that work.

A. He had full knowledge.

Q. Had you discussed it yourself with Mr. Eccles? A. Yes, sir.

Q. Now, as to the United Railways, state whether or not there was any employment of Mr. Bates on that matter, that lease of the United Railways, ninety-nine year lease, I believe.

A. Well, more particularly, his employment was connected—it resulted in a lease, but his employment was more particularly in connection with purchase.

Q. In connection with purchase?

A. We started out to buy the United Railroad. It

(Testimony of Charles T. Early.)

was represented we could get it for a certain amount of money.

Q. By whom was he instructed to make these negotiations? A. I directed him.

Q. And was knowledge of that brought home to the company? A. Mr. Eccles, yes.

Q. To Mr. Eccles. Will you state whether or not Mr. Eccles and Mr. Bates together went down over that property?

A. I don't think we went over the railroad together. Mr. Bates and I went over the railroad but I don't think Mr. Eccles was along.

Q. Now, relative to the Anna Smith and Reimers matters referred to in the complaint, and that have been mentioned. Was there any instruction or employment of Mr. Bates in reference to that matter.

Mr. DEVINE.—I object to that question as leading. He can state what was said. Whether there was employment is a conclusion entirely.

Q. All right, relative to this what happened? I will accept counsel's objection. What happened relative to Mr. Bates?

A. Mr. Bates negotiated with these people.

Q. How did he happen to negotiate with them?
[144]

A. Because in the meantime it had been decided that they would sell an interest in the property, either sell the stock or sell some of the stumpage.

Q. Oh, they had changed their plans?

A. Yes, sir.

(Testimony of Charles T. Early.)

Q. When was that plan changed?

A. Well, I couldn't give you the exact date, but it was after financial matters got in very much worse shape than they had been.

Q. Was that done at Salt Lake, do you know?

A. Well, the information came to me through Mr. Eccles.

Q. You say that was on account of financial matters that they changed their plans and decided to sell. Did Mr. Bates do any work on that?

A. Yes, sir.

Q. How did he happen to do that work, at whose instance?

A. That was at my instructions and I think Mr. Eccles directed him in some instances.

Q. Did Mr. Eccles, while Mr. Bates was working on the matter, do you know, meet with Reimers and Smith and Denkham?

A. He met Mr. Reimers, I think, in Chicago, but I don't know about Smith.

Q. Now, about the Collins matter, will you state whether Mr. Bates did any work on that?

A. Yes, more so than most any local matter, I think the Collins matter was up two or three times.

Q. And at whose instance did Mr. Bates do that work?

A. In the first instance, I think mine, in the last I think Mr. Eccles.

Q. Will you state whether or not Mr. Bates' relation to that work was known to the president, Mr. Eccles, and if so, how. What I want to get at

(Testimony of Charles T. Early.)

is if that knowledge was brought home to the company, and if so, how? [145]

A. He knew all about it, discussed it with Mr. Bates and discussed it with me.

Q. Did he make any objection to the employment of Mr. Bates? A. No, sir.

Q. The next one which is relative to the sale of the Wheeler timber, did Mr. Bates do any work upon that? A. Yes, sir.

Q. At whose instance? A. Mine.

Q. I would ask you to state whether or not that matter was brought to the knowledge of Mr. Eccles or any officer of the company, and if so, how, in what manner? A. To Mr. Eccles.

Q. What was that?

A. To Mr. Eccles by discussion.

Q. About the Owens transaction which is alleged here, did Mr. Bates do any work upon that?

A. I think so, yes.

Q. Who employed him?

A. I think that was on more of the stock as I recall it, stock selling.

Q. A stock sale?

A. Yes, he had those instructions from Mr. Eccles.

Q. He had what?

A. He had those instructions from Mr. Eccles.

Q. That is Mr. Eccles direct and not through you? A. Yes, sir.

Q. So you don't know as much about that. How

(Testimony of Charles T. Early.)

about the matter of the Mann transaction? Did he have any dealings there that you know of?

A. Yes.

Q. Who employed Mr. Bates? A. I did.

Q. State whether or not there was any knowledge of that brought home to the company, and if there was, in what manner?

Mr. DEVINE.—Object to the first portion of that question.

COURT.—I think it ought to be confined to the officers of the company.

Q. I assume it meant the officers of the company.

A. Mr. Eccles was the only officer outside of myself that knew about it.

Q. And did Mr. Eccles make any objection that you know of?

A. Not to my knowledge, no, sir. [146]

Q. Relative to the Stanley Dollar transaction, did Mr. Bates have any employment as the result of that? A. Yes, sir.

Q. By whom was he employed?

A. I think he had specific instructions from Mr. Eccles as to that transaction.

Mr. DEVINE.—I move to strike out what the witness thinks.

COURT.—That is your opinion and may be stricken out.

Q. Did you have anything to do with him relative to the Stanley Dollar matter?

A. I discussed it and knew negotiations were under way, yes.

(Testimony of Charles T. Early.)

Q. Were you present at any time when there were any discussions between Mr. Bates and Mr. Eccles as president of the Oregon-American Company?

A. I think I was in the office when Mr. Bates brought Mr. Dollar in.

Q. And was Mr. Eccles there?

A. Yes, the conference was with Mr. Eccles.

Q. Did you hear any of their conversation?

A. No, sir.

Q. As far as the Noble transaction was concerned, was there any employment there of Mr. Bates?

A. Yes, that was a matter that I took up, pure and simple. I don't know whether Mr. Eccles knew anything about it or not.

Q. You don't know whether Mr. Eccles knew it or not?

A. I don't know; it was a small transaction involving, I think one or two quarter sections of timber; it was immediately on the line of the P. A. & P. Railroad, and I thought we could get in an immediate operation while they were constructing the balance of the road.

Q. Relative to the Kerry deal, was there any employment in that matter of Mr. Bates?

A. Yes, sir.

Q. By whom? A. By me.

Q. I will ask you whether or not any knowledge of that was brought home to the officers of the company—Mr. Bates' activities?

(Testimony of Charles T. Early.)

A. Yes, I think I can say to all the officers and all the directors.

Q. Was any objection ever made to Mr. Bates' work as far as that [147] was concerned?

A. Not to my knowledge.

Q. And as far as the Keith transaction, when the stock was finally sold to the Central Coal & Coke Company for approximately seven millions, or something of that kind, had Mr. Bates received any employment as far as that matter was concerned? A. Yes, sir.

Q. Had any knowledge of that been conveyed to the officers of the company, and if so, in what manner and to whom?

A. Yes, I think that was understood by the entire board.

Mr. DEVINE.—I move to strike that answer out if the Court please.

COURT.—State what occurred, what was said, not your opinion.

A. Well, at a board meeting—

Q. Did you attend that meeting? A. Yes, sir.

Q. Where was it held? A. At Ogden, Utah.

Q. Go ahead.

A. At a board meeting where these matters were under discussion, the Keith and other matters, it was proposed by Mr. Devine that they make a wash sale, and eliminate Mr. Bates and all other brokers. They thought there might be various ones in Chicago who would claim a commission, and it was decided at this meeting that a wash sale would be

(Testimony of Charles T. Early.)

held, and I think Mr. Eccles was notified in Chicago that the property was sold, for him to come home.

Q. I don't understand just exactly what you say was proposed by Mr. Devine, that they have a wash sale; you say that this was proposed by Mr. Devine? A. Yes, sir.

Q. So they could do what to Mr. Bates?

A. They would eliminate any chance of having to pay commission to Mr. Bates or any one else in Chicago or other places, that might have been working on the property. [148]

Q. That was by selling stock instead of land?

A. Selling the stock wasn't discussed at that time; it was discussed subsequently.

Q. Now, was any objection made at that time or at any time, as far as the Keith deal was concerned, to your employment of Mr. Bates?

A. Yes, Mr. Bates was notified that his services would be no longer needed, as they were in touch with the principals in the east.

Q. When was the meeting that Mr. Bates was notified that his services would be no longer required?

A. I couldn't give you the date, but there was a wire sent in, I suppose he has the wire.

Q. I will ask you if you can fix the date according to approximately the date when the stock was sold to the Central Coal & Coke Company?

A. Well, I think Mr. Bates was notified in October, and I don't really know when they did close

(Testimony of Charles T. Early.)

up with the Central Coal & Coke Company, but it was many months afterwards.

Q. Was any notification given to Mr. Bates at that time, or did Mr. Bates do any work after that that you know of?

A. No, I think when he was notified to stop, he stopped.

Q. Because then the whole thing had been turned over to the Central Coal & Coke Company, was that the point?

A. Well, others were carrying on the negotiations.

Q. In closing up the stock deal? A. Yes, sir.

Q. After that time did Mr. Bates do any further work that you know of?

A. I haven't any in mind.

Q. Now, on behalf of this hiring that you have spoken of, or contracts that you have made with Mr. Bates, on behalf of whom did you undertake to make those contracts?

Mr. DEVINE.—Objected to as calling for the conclusion of the witness. [149]

COURT.—I think he can answer that.

Exception saved.

A. The Oregon-American Lumber Company.

Q. Did you tell Mr. Bates whom you were employing him for?

A. I wouldn't say whether that was discussed or not, the name of the company. Mr. Bates knew as well as I did, I think.

(Testimony of Charles T. Early.)

Q. Now, in all of these transactions which I have referred to—and I won't attempt to repeat them now—I will ask you to state whether or not at any time the defendant company made any objection known to you of your employment of Mr. Bates, or objected thereto.

A. I have no recollection of any.

Mr. WILBUR.—I think you may take the witness with the understanding that I am putting Mr. Early upon the stand at the present time purely for the purpose of showing his relationship with the company and the way in which he was held out, leading up to the matter, and these as to these various deals I will want to recall Mr. Early later.

Mr. DEVINE.—If they have something further with this witness I think they should finish with him before we proceed to cross-examination. They have touched upon every issue in this complaint, if the Court please, and every allegation in the complaint. If they have other proof by this witness, I think we should have that before we are called upon to cross-examine.

COURT.—Counsel can take his own course.

Mr. WILBUR.—My apprehension of the method of trial, the first thing that would be up here would be to trace Mr. Early's authority as to Mr. Bates' position. That is I understand that the question of principal and agent would be one of first interest, and that is the thing that I was endeavoring to prove by Mr. Early, his position with the company and his position with Mr. Bates. [150] Then I

intend to follow the matter up with Mr. Bates on these transactions, and then with Mr. Early on the main proposition.

COURT.—Mr. Devine seems to be satisfied with Mr. Early's testimony up to this time.

Mr. DEVINE.—I am not satisfied—

COURT.—I mean to let it stand as it is.

Mr. DEVINE.—I am satisfied to let it stand as it is, reserving the right to cross-examine in full and to place the witness upon the stand for cross-examination if he is not recalled by the plaintiff.

COURT.—Very well; as it now stands, he was held out by the concern as its authorized agent to represent them as far as the testimony now goes.

Mr. WILBUR.—I understand counsel waives cross-examination.

Mr. DEVINE.—No, I don't, I reserve it.

Mr. WILBUR.—Subject to the further orders of the Court.

COURT.—Subject to cross-examination when Mr. Early is called back the second time, but as I say leaving it as it is now, there is *prima facie* showing at least that he was held out by this concern as the general manager for Oregon, and the authorized representative, and that he made these contracts, if they were made at all, with the acquiescence of the president of the company.

Mr. DEVINE.—If the Court will bear with me for a moment, of course the procedure may be somewhat different that I have in mind, and I want to consult with my Oregon associates.

Mr. WILBUR.—I have a letter which I have just found, which I would like to introduce in evidence, from Mr. Early to Mr. Bates.

Mr. DEVINE.—Objected to as incompetent, irrelevant and immaterial to any issue in this case, upon the ground that there is no showing up to the present time that Mr. Charles T. Early, the witness here who purports to have signed this letter, had any power [151] whatsoever to make any such employment as is contended for here.

COURT.—What does it refer to, alleged employment?

Mr. DEVINE.—Yes.

Mr. WILBUR.—If counsel takes that stand, we will not insist.

Mr. DEVINE.—If the Court please, I am first going to ask to strike all Mr. Early's testimony on the ground that it is not under the theory of this complaint at all. This testimony goes entirely to a series of separate hirings and employments for entirely different and disconnected purposes, and not under any general contract of hiring as alleged, and as the theory upon which this action is brought.

COURT.—What is the theory of the complaint? I don't know.

Mr. DEVINE.—The theory of the complaint, as I understand the Court's interpretation of this matter submitted on demurrer, is this: That in 1917 a general contract of hiring was entered into with this plaintiff, and in pursuance of that general con-

(Testimony of Charles T. Early.)

tract of hiring, each and every paragraph, which is really in a manner a separate transaction, not related one to the other—they are all based upon the direct allegation in the complaint that each of these were performed in accordance with the general contract of hiring in 1917.

COURT.—Is that the theory of the complaint, Mr. Wilbur?

Mr. WILBUR.—We have alleged that in 1917 there was a general contract of hiring by Mr. Early, and, as stated by Mr. Senn yesterday, they had this property and Mr. Bates was more familiar with it than any one else, and there was a general contract of hiring at that time; that they would want his services from time to time upon that matter and would pay him [152] for the services what they were reasonably worth. If there is any question about that, we would of course want to follow it up with Mr. Bates to show the hiring and I will ask leave to ask this witness this question:

Q. I will ask you whether or not, Mr. Early, you had any contract of hiring with Mr. Bates in 1917, and if so whether it was written or oral.

Mr. DEVINE.—Just a moment, object to the first portion of it as being entirely a conclusion as to whether he had a contract of hiring.

Mr. WILBUR.—That is a question to be answered yes or no.

COURT.—He can answer the question.

Q. Yes, or no, whether you did have a general contract of hiring? A. Yes.

(Testimony of Charles T. Early.)

Mr. DEVINE.—Save an exception.

Q. Was that written or oral? A. Oral.

Q. Will you state what that contract was in 1917, along in August, or something of that kind it is alleged, if that was the date, whenever it is shown. What was the contract, or the terms thereof?

Mr. DEVINE.—Object to that first on the ground that there is no showing at all that this witness had any authority whatsoever to make such a contract of hiring. Second upon the ground that this is a single cause of action, and if he had such a contract and it was oral, it goes to the proposition that it was not in writing, because it has to deal with the disposition of lands and timber.

Mr. WILBUR.—That question has been ruled upon by Judge Wolverton adversely to counsel.

Objection overruled, exception saved.

A. I think I did explain that the first was in connection with the McCormick transaction. [153]

Q. In connection with what?

A. The McCormick transaction, and it was drawn out much longer than I ever anticipated it would be, that is it developed into many more transactions than we figured there would be in the beginning. I would say in that connection that it was my recommendation that the Portland & Southwestern Railway be bought; also that the McCormick Mill be bought, and the development made in an entirely different way than it was made.

(Testimony of Charles T. Early.)

Q. Now, when did you have your first talk with Mr. Bates? At what time in 1917 on this question?

A. Oh, I couldn't give you the date. It was very soon after the transaction was closed. I think it was closed on the first of July, 1917.

Q. You think it was about the first of July, 1917?

A. Yes, that is when the money was paid over and the property taken over by Mr. Early and his associates.

Q. What was the nature of the contract? Was there or was there not a general contract of hiring at that time? I want to get your idea as to what that contract was, in figuring for his services.

Mr. DEVINE.—I object to that portion of that question—was or was there not a general contract of hiring.

COURT.—Counsel modified the question.

A. In my opinion there was a general contract. The agreement was that he was to—his expenses were to be paid, and he would be properly compensated for his time. There was no understood—nothing understood as to whether it would be five dollars or twenty-five dollars a day.

Q. For anything that you might ask him to do?

A. Yes, in connection with the development of that property. It [154] was a big proposition and needed the utmost care and attention and I was particularly busy and Mr. Eccles was even busier than I.

Mr. WILBUR.—I think, if your Honor please, that testimony is sufficient. We are going to fol-

(Testimony of Charles T. Early.)

low that up with other testimony on the question of this contract.

COURT.—It can't be determined on testimony of one witness.

Cross-examination.

(Questions by Mr. DEVINE.)

Mr. Early, where did this conversation take place in 1917, and in whose presence, if any person, with reference to this general contract of hiring?

A. I think it was in my office in the Northwestern Bank Building.

Q. How long was that after the organization of the Oregon-American Lumber Company?

A. I don't recall when it was organized.

Q. With what officers or with whom did you discuss this plan of development that embodied the hiring of Mr. Bates in 1917, for all of these transactions which you have testified to?

A. No other officer, I think, except Mr. Eccles, until late in 1920. Then I discussed it with not only yourself, but all the other members of the Board.

Q. Was I a member of the Board in 1920?

A. I don't know. You had more to say than anybody else about policy.

Q. Was I an officer of the corporation at any time at all so far as you know?

A. No, I don't know as you were, but you were general manager for the Eccles interests.

Q. When you had this discussion then, with Mr.

(Testimony of Charles T. Early.)

Paul C. Bates, here in Portland, Oregon, in 1917, state if you will just what you said [155] to Mr. Bates about this employment.

A. I told him that we wanted to find the most practical way to develop the property, and there were various railroads leading towards it, and we either wanted to buy a road or build one, and my thought was to combine our timber with other timber and purchase a road that was already constructed, and extend it on to this timber.

Q. What else was said, now, aside from that about his contract of employment?

A. Well, it wasn't a very lengthy drawn out discussion. It wasn't necessary. He was simply told to go ahead and make these investigations from time to time, and that he would be paid for his time and his expenses.

Q. You say he was simply told. I am asking you to recite as nearly as you can the conversation. You stated the first portion of it being your theory; what did Mr. Bates then say to you?

A. What did Mr. Bates say to me?

Q. Yes.

A. Very well, he would be very glad to assist in any way that he could.

Q. What else, if anything, was said with reference to the scope of that employment that you were then making? A. Nothing.

Q. Nothing else at all? A. No.

Q. What expenditures of money did you then

(Testimony of Charles T. Early.)

and there authorize him to make for the Oregon-American Lumber Company?

A. I authorized him to make an indefinite amount.

Q. An indefinite amount? A. Absolutely.

Q. Up to the full amount of the capitalization of the corporation?

A. Oh, no. I knew Mr. Bates and knew that he was reliable; he wouldn't overcharge and I had the utmost confidence in him.

Q. Did you at that time state to Mr. Bates what your authority was [156] to make this arrangement? A. I think not.

Q. Did you at that time state to Mr. Bates what your position with the company was?

A. It wasn't necessary. Mr. Bates knew all about it.

Q. So there was nothing said in the conversation, in this general employment, with reference to your position with the company at all? A. I think not.

Q. Did you at that time, Mr. Early, have any meeting with the directors of the company, in which you were given authority to make such a contract of employment?

A. I had had no meeting with the Board.

Q. Did you at that time, or prior to the time that you have mentioned in 1920, and the fall of that year, ever have any meeting with the Board in which the Board took any action authorizing you to make this employment, or any employment?

A. I have already testified that I did not.

(Testimony of Charles T. Early.)

Q. That you did not?

A. Never attended a meeting prior to that.

Q. Now did you in 1917 occupy a position with the company in which you reported to the Board of Directors at any time? A. Prior to 1917?

Q. No, in 1917.

A. With the Oregon Lumber Company, yes.

Q. I am not talking about the Oregon Lumber Company. We are talking about the Oregon-American Lumber Company.

A. I can say to you that this timber was bought for the Oregon Lumber Company in the first place.

Q. I am not asking you that, Mr. Early. Will you answer my question: Did you at any time in 1917 make any report of your activity as to hiring Mr. Bates or any other person to the Board of Directors of the Oregon-American Lumber Company? A. No, sir; I think not.

Q. Did you in 1918? A. I think not. [157]

Q. Did you in 1919? A. I think not.

Q. Did you in 1920? A. Yes.

Q. And what form did that report take?

A. It was just simply a verbal report when I was instructed to dispose of the property.

Q. Now, that was late in 1920 as I understood you? A. Yes.

Q. So from the beginning of this employment in 1917 down to 1920, late in 1920, you at no time ever directly or indirectly, or by writing made any report to the Board of Directors of the Oregon-Ameri-

(Testimony of Charles T. Early.)

can Lumber Company of any of the previous transactions that you have testified to here?

A. No, sir; I reported to the president.

Q. And as far as you personally are informed, you don't know whether the president of the corporation ever repeated, through writing or orally, any statements made by you in the so-called reports to the president, to his Board of Directors?

A. No, I don't know.

Q. During the entire time, Mr. Early, what salary were you placed upon by the Board of Directors of the Oregon-American Lumber Company?

A. I drew my salary from the Oregon Lumber Company and the Mount Hood Railway Company; I don't think I drew any from the Oregon-American.

Q. There was no salary drawn from the Oregon-American Lumber Company by you? A. No, sir.

Q. You were never on its payroll?

A. I think not.

Q. And at the time that you said, in 1917, that you made this general contract with Mr. Bates, you have now said to the Court, I take it, as nearly as you can recall, all that was said with reference to that employment? A. Yes, sir.

Q. Was there anything said in that employment of selling the stock of the stockholders to the Central Coal & Coke Company of [158] Kansas City, Missouri, in 1917? A. No, sir.

Q. Was there anything said in that contract at

(Testimony of Charles T. Early.)

that time with reference to selling the tract of timber to Mr. Kerry and his interests?

A. No, Mr. Devine. I testified that that came up very much later.

Q. It wasn't even in your contemplation of mind at the time you talked to Mr. Bates in 1917, was it?

A. Couldn't have been, no, sir.

Q. Neither was the Central Coal & Coke Company transaction in any contemplation of mind at the time you talked to Mr. Bates?

A. I don't know as I ever heard of the Central Coal & Coke Company at that time.

Q. Was the deal with the Mitsui Company you spoke of in your contemplation of mind at the time you talked to Mr. Bates?

A. Yes, that was very soon afterward, as I remember.

Q. Was it in your mind at the time you made this general contract of employment in 1917?

A. What was in my mind was to do whatever was necessary at the time.

Q. Answer my question. Was that in mind? Did you have that deal in mind at that time?

A. No, I couldn't have it in mind because I never knew it was going to come up.

Q. Did you have in contemplation of mind at the time you made this so-called general contract of hire in 1917, any idea that you were going to offer any standing timber or acreage of the Oregon-American tract for sale?

(Testimony of Charles T. Early.)

A. Yes, I thought that we might offer this next to the Wheeler.

Q. That was your judgment at that time?

A. That was my judgment because I had discussed it with the president, and he didn't want to buy that timber when he bought it, and we always figured that it would sooner or later be sold.

Q. What relationship did you have, Mr. Early, to this purchase of this timber by the Oregon-American Lumber Company in 1917? [159]

A. What did I have?

Q. Yes.

A. I was instructed repeatedly by the Board of Directors to find a billion feet of good fir timber. I looked over British Columbia—

Q. Board of Directors of what company?

A. The Oregon Lumber Company for whom the timber was first bought.

Q. What relationship did you have to Mr. Bates in 1917, at the time this timber was bought?

A. I had the same arrangement with Mr. Bates then that I had later.

Q. Who did Mr. Bates represent in 1917, when the timber was bought, as far as you understood the situation?

A. He represented Mr. DuBois and Mr. Eccles.

Q. In representing Mr. DuBois, he was representing Mr. DuBois as agent to sell this timber, wasn't he? A. Yes.

Q. What relationship did you have with reference to the commissions that were paid by Mr. DuBois

(Testimony of Charles T. Early.)

or by Mr. Eccles to Mr. Bates in the purchase of this timber in 1917? A. I didn't have any.

Mr. WILBUR.—Objected to as incompetent, irrelevant and immaterial. That has to do with the DuBois transaction which was the transaction beforehand.

COURT.—I understand that but I think he can answer.

Q. You may answer, Mr. Early.

A. I answered.

Q. What did you say?

A. I said I didn't have any.

Q. Did you receive any commission from Bates on that transaction?

Mr. WILBUR.—Same objection.

COURT.—Same ruling.

A. What is the question.

Q. (Read.) A. I did.

Q. How much?

A. I think \$17,000. Now, just a moment—

Q. I will ask the question.

A. That is all right. I am going to answer this one. I want [160] to say to the jury—

Q. Just a moment. If the Court please, I think he may answer my question.

COURT.—He may explain.

Mr. WILBUR.—He can explain. We will explain pretty well before we get through with it. Go ahead.

A. I will say that when Mr. Bates first suggested to me that he give me a part of the commission, it

(Testimony of Charles T. Early.)

was after the contract was closed, and we never had any *any* understanding prior thereto. I said that I would first have to ask Mr. Eccles about it, that I wouldn't take it without his permission. I talked to the president and told him what Mr. Bates had suggested, and he said it was perfectly all right, "If he wants to give you all his commission, why go ahead and take it. You work hard and it is all right with me." and I think Mr. Eccles will testify to that before this case is over. There is nothing to conceal about the commission; I am not ashamed of it, and it was perfectly regular in every way.

Q. Did you ever make a report of that to the Board of Directors of the Oregon-American Lumber Company? A. No, I did not, because I—

Q. Did you ever make a report of that to the Board of Directors of the Oregon Lumber Company?

A. No, sir, but they knew about it.

Q. Now, coming down to the transaction with Mr. Bates in September, or in July, 1917, when this so-called general contract that you have spoken of was entered into, what if anything was said by you, or by Mr. Bates, with reference to the division of any commissions that might result from the handling of this property?

A. Never was a discussion on any deal. We never had any understanding.

Q. Beg your pardon?

(Testimony of Charles T. Early.)

A. We never had any understanding with respect to commissions. [161]

Q. You are not now employed by either the Oregon-American Lumber Company, the defendant here, or the Oregon Lumber Company which you spoke of as the Eccles company, or by any of its railroad companies, are you. A. No, sir.

Q. When did your relationship of officer or employee of either of these companies terminate?

A. Well, it was terminated at different times. I tendered my resignation August 25, 1921. It was accepted thirty or sixty days later.

Q. Was that prior to the bringing of this action, as you understand it?

A. I don't know when the action was brought.

Q. You don't know when the action was brought?

A. No, I don't.

Q. When did you first learn that Mr. Bates had performed a service for the Oregon-American Lumber Company with reference to the Central Coal & Coke Company transaction?

A. After I was at Ogden and came back by way of San Francisco at your request, and came on to Portland, it was within a very few days of that time. I think it was in November.

JUROR.—What year? A. 1920.

Q. Do you recall of having had a discussion in 1921 along about the month of September, with Mr. David C. Eccles, Mr. Charles S. Keith, President of the Central Coal & Coke Company, and myself, with reference to the sale of the properties of the Oregon-

(Testimony of Charles T. Early.)

American Lumber Company, in your office in the Yeon Building, in this city?

A. Yes, sir; indeed I do.

Q. Did you at that time state to Mr. Keith and to the other men including myself there present, that Mr. Paul C. Bates had absolutely no connection with this company?

A. No, sir, I made no such statement.

Q. Are you confident of that? A. Yes, sir.

Q. Isn't it a fact—let me refresh your recollection—isn't it fact that you received a letter about that time from a man at [162] Seattle, Washington, by the name of Beckman, alleging that he was the instigator or agent or broker that brought Mr. Keith's purchase of the stock interest in this company about, and that he was entitled to a commission. Do you recall that?

A. Yes, I recall a letter from Mr. Beckman, and he also called at the office, and I would say in that connection—

Q. Just answer my question.

A. I am going to answer.

Mr. WILBUR.—I think he is entitled to answer.

COURT.—You have answered the question and that is all that is required.

Mr. WILBUR.—May the witness make an explanation?

COURT.—No, he has answered the question. Why go on with some personal matter wholly foreign to the question asked?

Q. I will ask you if at that time, at the time

(Testimony of Charles T. Early.)

this conversation you refer took place, if you then did not dictate a letter to Mr. Keith, in substance stating that Mr. Paul C. Bates, who was referred to in the Beckman correspondence to you, had absolutely no connection with the sale of any of the properties, and particularly with the sale of the stock to the Central Coal & Coke Company by the Oregon-American Lumber Company?

Mr. WILBUR.—May it please your Honor, I think the witness has a right under the statute to see the letter if they have such a letter.

A. I think I can answer that.

COURT.—He asked if you dictated such a letter.

A. I dictated a letter to Mr. Keith and I didn't think Mr. Bates could come in for commission on account of the fact that I knew that Mr. Eccles had had the matter up with Mr. Keith a long time prior, but I didn't correctly understand it for the reason that Mr. Eccles was negotiating for a stock sale, that is to interest him for a million dollars worth of stock, and at that time the sale of the property never was under consideration. In fact the sale of the property, as you well know, never was authorized [163] until late in October, 1920.

Q. You do remember, then, I take, of having dictated and signed such a letter as I speak of?

A. I wrote Mr. Keith. I told him I didn't think there would be any trouble about any commission with Mr. Bates.

Q. I hand you what purports to be a copy of a letter, Defendant's Identification A, written about

(Testimony of Charles T. Early.)

that time, purporting to have been written by you to Mr. Beckman, and will ask you if you recall having dictated a letter of which this is a counterpart, and placed it in the United States mail addressed to Mr. Beckman at Seattle.

A. Yes, I think that letter was written at the request of yourself and Mr. Keith, because your idea at that time was to evade paying commission by selling the stock rather than selling timber.

Q. Now, Mr. Early, since you made that statement, you mean to state to this Court and jury that the facts that you state in this letter to Mr. Beckman over your signature were not the truth?

A. I don't see anything untrue in the letter. The stockholders sold out, at least a certain percentage of them, and that is what the letter states.

Q. Then it is the truth as far as you know, and this copy of the statements of fact made by you, as of the date that this carbon copy bears, with reference to Mr. Beckman and Mr. Paul C. Bates' claim is true?

A. Yes. The purpose of the letter, however, was to eliminate anybody from any commission.

Q. If it is true and a fact, the purpose of it has nothing to do with it; it is a fact, is it?

A. If we eliminate it, it is all right with me.

Mr. DEVINE.—I would like to introduce the letter.

Mr. WILBUR.—I don't have any objection. It is certainly [164] not binding upon Mr. Bates—

(Testimony of Charles T. Early.)

with the understanding it is not a letter binding upon Mr. Bates.

Letter offered in evidence and marked Defendant's Exhibit "A" and read as follows:

Defendant's Exhibit "A."

September 16, 1921.

Mr. Victor H. Beckman,
517 Eighteenth Ave. N.
Seattle, Washington.

Dear Sir:

Replying to your favor of the 6th, the Oregon-American Lumber Company has not disposed of its timber holdings to anyone. The Central Coal & Coke Company acquired the stockholding interests of some of the stockholders of the Oregon-American Lumber Company.

Mr. Keith denies that he was your customer or that you interested him in the property. The Oregon-American Lumber Company gave to neither Mr. Bates nor anyone else the right to offer its property to the Central Coal & Coke Company, or to offer for sale the stock of its stockholders.

Yours very truly,

OREGON-AMERICAN LUMBER COMPANY.

CTE:D

By _____.

Q. CTE are your initials, are they not?

A. Yes, sir.

Q. Now, Mr. Early, did you understand that Mr. Paul C. Bates was in the employ of the Oregon-

(Testimony of Charles T. Early.)

American Lumber Company in October, November and December of 1920?

A. I did, most emphatically.

Q. You did? A. Yes, sir.

Q. When did you reach that understanding? That is when did that state of mind become known to you? A. In Ogden, Utah, at your meeting.

Q. Then why, in 1921, did you state that Mr. Bates had no connection with the sale of this property? [165]

A. That was written at the request of yourself and Mr. Keith.

Q. I understand, but regardless of whose request it was written at, it is the truth and the facts?

A. As far as I know.

Q. That is your explanation of your understanding in 1920, and your statement in 1921?

A. Yes, sir.

Q. Now coming to the 1920 transaction, during the time that Mr. Bates, as you understand it then, was under this general employment with the Oregon-American Lumber Company, he at the same time negotiated a deal for the Inman-Poulsen Lumber Company, and at that time represented the purchaser rather than the Oregon-American Lumber Company, didn't he?

A. Yes, he represented the purchaser.

Q. And your dealings, if any you had in 1920, with reference to the Inman-Poulsen deal, were with Mr. Bates at arms length as the representative of the Inman-Poulsen Lumber Company?

(Testimony of Charles T. Early.)

A. There is only this difference between the transactions in 1920 or after that, Mr. Devine. After this meeting in Ogden when I went to San Francisco, I 'phoned Mr. Bates and told him to do everything possible to interest people that would likely be in the market for timber.

Q. That may be interesting, Mr. Early, but it is not answering my question. I prefer that you answer my question.

A. Well, I am endeavoring to answer.

Q. Mr. Bates in the entire Inman-Poulsen deal represented the Inman-Poulsen people, and not the Oregon-American. Isn't that correct?

A. Yes, I think that is correct.

Q. And he received a commission on the sale of the property of the Oregon-American Lumber Company from the Inman-Poulsen Lumber Company, didn't he? A. We sold it net.

Q. Well, you know?

A. It was my understanding.

Q. And you know his commission was paid by the buyer? A. Yes, sir. [166]

Q. And in that particular transaction he acted in the capacity of lumber or timberland broker, didn't he?

Mr. SENN.—That is a conclusion.

COURT.—State what capacity he acted in.

Q. Explain how you understood it.

A. Well, if the deal had not been made the company would have been obligated to pay him for his time.

(Testimony of Charles T. Early.)

Q. That is not my question. Will you please answer the question, Mr. Early.

A. That is the best answer I can give.

Q. You understood that he acted in the capacity, in that deal, of a broker representing the purchaser, and claiming commission for his representation in that particular, didn't you?

A. He found a buyer at my request, made over the phone from San Francisco, yes, sir.

Q. Were you present in the office of the Oregon Lumber Company which I understand was a common office used by the Oregon-American Lumber Company, in 1921, during the time that the representative of Price, Waterhouse & Company, Accountants, made an audit of the Oregon-American Lumber Company? A. Yes, sir; I was.

Q. Is it not a fact, Mr. Early, that at that time you were solicited for any information that you might have by the representative of Price, Waterhouse Company, with reference to any known obligations owing by the Oregon-American Lumber Company, whether in the form of accounts stated, or contingent obligations?

A. No, sir, I don't think that is a fact.

Q. You don't think that is a fact? A. No, sir.

Q. Isn't it a fact that you made a written statement to Price, Waterhouse & Company's representative, that other than the accounts upon the books of the company you knew of no obligations of the company, either direct or contingent, in May, 1921?

A. I don't have any recollection of ever having done so.

(Testimony of Charles T. Early.)

Q. Would you say you did not? [167]

A. My best judgment is that I did not. They asked me about various accounts, but a broad statement like that I don't think was made.

Q. Did you state to the representative of Price, Waterhouse & Company at that time, when they were seeking to find out the financial condition of the Oregon-American Lumber Company, that you say you were making these contracts of hiring for, —did you state to them at that time that you had employed Mr. Bates and that he had rendered services upon the many items that you have testified to here, between 1917 and May, 1921?

A. No, sir; the auditors bothered me very little. They asked me very few questions.

Q. You understood at that time, though, that the effort that was being put forth in the making of that audit, was to ascertain all the obligations of the Oregon-American Lumber Company, didn't you?

A. I supposed that was it but I wasn't consulted. I didn't hire them, and didn't know anything about the instructions.

Q. And knowing, however, that that was the effort that was being put forth in hiring these auditors, and while they were working in the office you occupied during that period, I take it, of approximately sixty days—were they not?

A. I don't remember, probably that is right.

Q. You made no statement to them that all of these vast sums of money that you had contracted

(Testimony of Charles T. Early.)

for were obligations outstanding of the Oregon-American Lumber Company?

A. They never asked my opinion, never asked me any questions that I didn't answer to the fullest of my ability.

Q. Going now to the Kerry transaction: Who did you discuss that with at the outset, in that transaction as a representative of the Kerry interests? And now, Mr. Early, I mean by that, was there some Frick Logging Company or Kerry Logging Company may have been involved—I am speaking of them generally, so you get my idea, as the Kerry interests. [168]

A. The first talk that I had with anyone about this property I think was with Mr. Kerry himself. I told him that it was not for sale, it being my understanding that nothing would be sold that would go out over any other road except the P. A. & P. Railroad.

Q. That was your understanding at what period of time, Mr. Early?

A. Well, I couldn't give you—that would be in 1920, I think.

Q. In 1920. A. Early in 1920.

Q. So that from the beginning of this corporation's effort in 1917, about July, 1917, down to some time—a date fixed by conversation you had with Mr. Kerry—you were under the impression that no business would be transacted by the Oregon-American Lumber Company as far as the sale of

(Testimony of Charles T. Early.)

any of its lumber was concerned, that wouldn't come out over the P. A. & P. Railroad?

A. No, that isn't exactly true, Mr. Devine—in that territory, but not in the Wheeler territory.

Q. In 1920 isn't it a fact that the first proposition that came to the Oregon-American Lumber Company, as far as you were informed, came as an authorization of the Board of Directors directing myself as attorney in fact, and I turned that over to you, giving you a copy of the resolution adopted by the Board of Directors, to make disposition to Kerry of certain then called northern or fringe timber?

A. I never saw any resolution of the Board of Directors, and that didn't come to me that way at all.

Q. Isn't it a fact that Mr. Porter, E. L. Porter, of Portland, Oregon, who was a logger carrying on a logging operation on the so-called Kerry road, being on a tract of timber lying to the north of the Oregon-American tract, went to Mr. Paul C. Bates with the purpose of ascertaining what timber offerings he had, and that Mr. Porter wrote a letter to Mr. Bates, which Mr. Bates delivered to you, authorizing Mr. Bates as agent for Mr. Porter to make an [169] offer to the Oregon-American Lumber Company for a certain percentage of its timber?

A. That is substantially correct, yes.

Recess until two o'clock.

Thursday, April 3, 1923, 2 P. M.

C. T. EARLY resumes the stand.

Cross-examination (continued).

(Questions by Mr. DEVINE.)

As a part of the cross-examination of this witness I desire at this time under the stipulation under which this exhibit was admitted, which is a file of the corporation records, to read to the jury the power of attorney referred to as running from the corporation to Charles T. Early.

Reads as follows:

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS:

That the Oregon-American Lumber Company is a corporation duly organized under and by virtue of the laws of the State of Utah; having its principal place of business in the City of Portland, County of Multnomah, and State of Oregon.

That the said Oregon-American Lumber Company has made, constituted and appointed, and does hereby make, constitute and appoint Charles T. Early, a citizen of the United States and a citizen and resident of the State of Oregon, its true and lawful attorney in fact, and authorized agent for it, and in its name, place and stead to make and accept service of all writs, processes and summonses in any action, suit or proceeding in any of the courts of the State of Oregon, or the United States Courts therein, and upon whom all lawful writs, processes and summonses may be served with the same effect as though the company existed

(Testimony of Charles T. Early.)

in the State of Oregon, requisite and necessary [170] to give competent and complete jurisdiction of the said Oregon-American Lumber Company to any of the said courts giving and granting unto the said Charles T. Early full power and authority to do and perform every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the said Oregon-American Lumber Company might or could do if personally present, hereby ratifying and confirming all that said Charles T. Early shall lawfully do or cause to be done by authority thereof.

This power of attorney is irrevocable except by the substitution of another qualified person for the one hereby appointed attorney in fact.

IN WITNESS WHEREOF, said corporation, in pursuance of a resolution duly adopted by its Board of Directors, has caused this instrument to be executed in its name by its President and Secretary, and its corporate seal to be hereto affixed the 20th day of June, A. D. 1917.

OREGON-AMERICAN LUMBER COMPANY.

By DAVID C. ECCLES, (Seal)
President.

[Seal] By ROYAL ECCLES, (Seal)
Secretary.

Q. Mr. Early, I hand you here what has been marked as Defendant's Identification "B," which purports to be a copy of a letter addressed to Mr. Paul C. Bates, written by you, and will ask you

(Testimony of Charles T. Early.)

whether or not you have a recollection of having written such a letter and filed that copy as a counterpart thereof in the files of the company.

A. Yes, I remember that letter.

Q. Under the date, I take it, that that carbon copy bears? A. Undoubtedly.

Mr. DEVINE.—I desire to offer this carbon copy in evidence.

Received without objection and marked Defendant's Exhibit "B" and read as follows: [171]

Defendant's Exhibit "B."

January 11, 1921.

Mr. Paul C. Bates,
Yeon Building,
City.

Dear Bates:

Referring to recent conversation with respect to the sale of timber at or near Cochrans to the Wheeler people, will say that it is understood that if these negotiations are closed that you are protected on your commission.

This already stated to you personally, but we have no hesitancy in putting the matter in writing.

Yours very truly,

OREGON-AMERICAN LUMBER COMPANY.

By _____.

CTE:AF.

Q. Mr. Early, by what other name is this transaction referred to in this letter known and referred

(Testimony of Charles T. Early.)

to by counsel in his questioning of you this forenoon on your direct examination?

A. It is in connection with the Lausman-Wheeler transaction.

Q. How did it come that if Mr. Bates was under a general contract of employment, that you were at the same time assuring him that his commission would be paid?

A. I endeavored to tell you before noon that there was a different arrangement made after the meeting at Ogden.

Q. In other words, these transactions did not come under, as I understand it, the general contract of hiring that you spoke of as having taken place in 1907.

A. No, he had a guaranty whether we made the sale, or whether we didn't, but it would be the same thing except I impressed upon him the importance of crowding these sales faster after we found out the financial condition the company was in.

Q. Mr. Early, this transaction, this Lausman-Wheeler transaction, [172] was a commission proposition, to the effect that if Mr. Bates succeeded in interesting the Lausman-Wheeler people in the sale of this property, as a timber broker, he would receive a commission for it. Is that correct?

A. For any transaction closed we had a definite understanding as to what it was to be, and it was submitted latterly to you people in Ogden as you well know.

Q. Answer my question now.

(Testimony of Charles T. Early.)

A. That is the best I can.

Q. He was to receive a commission as you understood it? A. On that sale, yes.

Q. So that was a contract separate and apart and independent of this contract, the terms of which you detailed as taking place in 1917?

A. I don't know whether you would consider it as separate and apart or not.

Q. Did the contract of 1917 that you detailed here this forenoon on the witness-stand, have anything at all about commission in it? A. No, sir.

Q. So this transaction here, this Lausman-Wheeler transaction, never was consummated, was it? A. No, sir.

Q. So there never was any commission earned, was there?

A. Wouldn't be commission in it; would be compensation, though.

Q. Never were any commissions earned at any time? A. No, sir.

Q. And you were in this letter attempting to assure him that commissions would be paid?

A. Yes, sir, if the sale went through.

Q. And that was a different agreement from what you had in 1917? A. Originally, yes.

Q. Assuming, Mr. Early, that if the commission in the Lausman-Wheeler transaction had been earned, what then would your understanding have been with reference to Mr. Bates being entitled to his earnings and his daily per diem? [173]

(Testimony of Charles T. Early.)

Mr. WILBUR.—May it please your Honor, I don't think we care particularly about this, but I object to it, because, as I understand the situation, the Lausman-Wheeler transaction that they are referring to is not a part of the transaction upon which we are suing. That is my understanding, is not that correct?

Mr. SENN.—We are not claiming anything in the Lausman transaction.

Mr. DEVINE.—It is one of the transactions I asked Mr. Early about with reference to his testimony this forenoon, and he said yes, and in relation to the sale that involved the southern portion of the tract, isn't it, Mr. Early?

A. Yes, but I don't think it is anywhere in this case.

Q. Did you, at any time, Mr. Early, make any contracts in writing for the Oregon-American Lumber Company with Mr. Bates?

A. No, any contracts would be merely letters.

Q. Would be merely letters? A. Yes, sir.

Q. Isn't it a fact, Mr. Early, that prior to your meeting with the Board of Directors, at Ogden, Utah, on or about the month of October, 1920, that you at no time prior to that ever reported to any person other than David C. Eccles, as you said here, as to any financial or general contracts, or any operations with respect to this property?

A. That is true. I testified to that this morning. It was only latterly that I took it up with you people in Ogden, to make any reports.

(Testimony of Charles T. Early.)

Q. You then were requested to come into Ogden by the Oregon Lumber Company, were you not?

A. I don't know; I don't so understand it.

Q. Isn't it a fact that in August, 1920, you as an officer and director of the Oregon Lumber Company met with its Board of Directors at Ogden, Utah? I am asking you about this to fix your [174] mind as to the dates.

A. That is perhaps true. I met with them that year, yes.

Q. Isn't it a fact that at that meeting of the Board of Directors in Ogden, Utah, of the Oregon Lumber Company, the Board of Directors asked you whether or not you had been giving any time or attention to the affairs of the Oregon-American Lumber Company, or acting in any capacity as an officer of that company on the salary that was being paid you by the Oregon Lumber Company, and isn't it true that in response to that you said to that Board of Directors at that time and session that it was absolutely untrue, that you had nothing to do with the affairs of the Oregon-American Lumber Company?

A. I don't think I ever made any such statement.

Q. Would you say you did not? A. Yes.

Q. Do you recall having discussed that subject?

A. No, I do not. It might have been discussed but I have no recollection.

Q. You have no recollection. Isn't it a fact that at that time you said that the only reason why the Board of Directors of the Oregon Lumber Company

(Testimony of Charles T. Early.)

may have conceived the idea that you were devoting some time to the Oregon-American Lumber Company was because it happened to have offices in the same building in Portland, Oregon?

A. No, I think not.

Q. Now, the man you spoke of this morning as being the tax agent of the Oregon-American Lumber Company, was a man that was employed by the Oregon Lumber Company as a tax agent, was he not?

A. He was employed here for the various companies.

Q. He simply acted in his capacity as tax agent for the Oregon-American Lumber Company under the previous employment he had?

A. No, sir, he was paid additional compensation.

Q. You never had any authority from the stockholders of this [175] company, directly or indirectly, except as came through myself, in December, 1920, to sell the entire tract of timber, did you?

A. No, sir. It never decided to sell it until I think October.

Q. Isn't it a fact that in November, 1920, you wrote a letter to Mr. Paul C. Bates stating to him at that time that you had no authority whatsoever to make any offerings of the standing timber of the Oregon-American Lumber Company, in person and that further than that the Oregon-American Lumber Company were not disposed to sell any stand-

(Testimony of Charles T. Early.)

ing timber, but on the contrary were in the market to buy additional timber?

A. I might have. Might have been at your request, the same as the telegram was, to withdraw the price of three dollars, as that was not enough.

Q. Isn't it likewise a fact that after Mr. Porter interviewed you, or Mr. Bates interviewed you as the representative of Mr. Porter, with a letter signed by Mr. Porter, which he delivered to you, for his authority to call on you—isn't it a fact that at that time or subsequent thereto Mr. Kerry called at the office that you were occupying?

A. Surely.

Q. Isn't it a fact that at that time you made statements to Mr. Kerry that you had no authority to sell any timber land of the Oregon-American Lumber Company, and that if any such timber lands were disposed of any proposition of that kind must be submitted to the Board of Directors at Ogden, Utah?

A. No, I didn't make a statement of that kind to Mr. Kerry. I told him as to this particular piece of timber I didn't think it was for sale, for the reason as I told you this forenoon, that it would come out over another road, and the main thing was to hold the timber for the P. A. & P. Tonnage. That was the road that you were building.

Q. Did you have any authorization of the Oregon-American Lumber Company to expend any money at any time in the purchase of [176] railroads that you discussed this morning?

(Testimony of Charles T. Early.)

A. No. I was simply getting prices and reporting to the president. I wasn't buying railroads. I was recommending properties that I thought it would be advantageous to acquire in connection with the development of this property.

Q. You didn't feel that you had any authority to do that yourself, did you, Mr. Early?

A. To buy them?

Q. Yes. A. No, sir.

Q. You didn't think that you could go out and negotiate and close any deal for properties for this company, at any time, did you?

A. Certain properties, yes, I would say, in answer to that, Mr. Devine, that I never did anything that was questioned by my people during the thirty-three years that I was with them. In other words, they never had to repudiate anything that I did.

Q. Answer my question, Mr. Early. You never, did you, for the Oregon-American Lumber Company, assumed to attempt to sell any of its properties without at least put it up to the president, as you said, or the Board of Directors?

A. Oh, no, certainly not.

Q. And didn't have it?

A. I never done business that way.

Q. I hand you what has been marked Defendant's Identification "C," and will ask you if you recognize that as a copy of a telegram sent by you to David C. Eccles, the then president of the Oregon-American Lumber Company? A. Yes, sir.

(Testimony of Charles T. Early.)

Q. The original of that was signed by you and placed in the telegraph office for sending, was it, and transmitted? A. Undoubtedly.

Telegram offered in evidence, received without objection, and marked Defendant's Exhibit "C," and read as follows:

Defendant's Exhibit "C."

WESTERN UNION TELEGRAM.

(Copy)

Portland, Oregon, November 18, 1920. [177]
David C. Eccles,
Care Oregon Lbr. Co.,
Lbr. Exch. Bldg., Chicago, Ill.

Made Bates counter proposition three fifty per thousand and at conference yesterday developed Kerry backing proposed buyer and insisted that timber move over their line when I stated that it would not be sold at price made except that it move out over the P. A. & P. line and if this is not in line with your wishes wire quick stop I am of the opinion that they would yet try to reduce that price to three twenty five but not below that I made them understand a definite proposition three fifty basis.

C. T. EARLY.

Q. Now, when you sent that telegram that was at the time that these negotiations were being carried on with Kerry, was it not?

(Testimony of Charles T. Early.)

A. It was the Kerry transaction. I don't know whether it was Porter at that time, or whether it—Mr. Porter, I think, was carrying on the negotiations.

Q. And you afterwards learned that Mr. Porter's negotiations were on behalf of Kerry, didn't you?

A. Yes.

Q. So whether Porter or Kerry, you understand I am referring to the one transaction?

A. Yes, amounted to the same thing.

Q. Mr. Early, how is it you said this forenoon, in answer to counsel's question here, that you hired Mr. Bates to make this Kerry deal, and in your telegram to the president of this Company on November 18, 1920, which I have just read, you said that you made the proposition on behalf of the company to Bates for the other people? How do you reconcile these two statements?

A. Well, my arrangement with Mr. Bates was to develop any sources that it was possible for him to develop, and I didn't know whether it would be Smith, Brown, Jones or Kerry. That was under the other arrangement when the proposition came up definitely before you. [178]

Q. Now, Mr. Early, isn't it a fact that Mr. Bates came to you and presented a letter authorizing him to do business for Mr. Porter?

A. Yes, Mr. Bates got that—

Q. And at the time this transaction was going on you regarded that Bates, standing on one side, was endeavoring to make the best deal possible against

(Testimony of Charles T. Early.)

your company, the Oregon-American Lumber Company, wasn't he?

A. Not in that deal. I understood that he was to submit whatever offer they had to make, and he did.

Q. Why is it that you say here that you thought you could keep the price of this timber that was proposed to be sold up to three and a quarter when dealing with Bates? A. Why did I say that?

Q. Yes.

A. I knew it was worth that and I think Mr. Bates thought it was worth that, and if it hadn't been for your financial condition would have eventually got twice that.

Q. If Mr. Bates had accepted the proposition made on the date that you sent this wire, you would have closed the proposition, on the one hand, you speaking for the Oregon-American Lumber Company, and Mr. Paul C. Bates being the contracting party of the buyer, wouldn't you?

A. Oh, yes, we would have closed undoubtedly.

Q. Yet you want to tell this jury that knowing that Bates was working for Kerry, working for Porter, you expected to pay Bates at least \$43,000?

Mr. WILBUR.—I don't understand that witness said that he was working for Kerry.

A. I didn't. And I didn't mention \$43,000, either.

Mr. WILBUR.—I think that is an improper assumption on the part of counsel. I don't think there is any evidence here to justify that. [179]

(Testimony of Charles T. Early.)

COURT.—I think it is proper cross-examination.

Q. Now answer the question, Mr. Early, that I ask you—\$39,000—I may be in error.

A. Let's have the question.

Q. (Question read.) Continuing: or a commission amounting to fifteen cents a thousand?

Mr. WILBUR.—I object to that question for the reason that I consider it is based on an improper assumption that this witness has said that Mr. Bates was working for Mr. Kerry.

COURT.—I think it is proper cross-examination.

A. The price at which the timber would be sold would be—on that price would be dependent the amount of the commission, and you well know that when they were talking about a three dollar price in connection with this deal, that I wired you that even at that figure it would have to carry a commission of two and a half per cent to Mr. Bates. I got him to reduce his commission to that amount.

Q. But you expected—you mean to say that you expected that Mr. Bates, the official representative in this deal of Mr. Kerry and Mr. Porter—that you in addition to paying commission, expected to pay him a salary and his expenses?

A. If he had got the commission, he wouldn't have asked it.

Q. It doesn't make any difference what he would have asked. Did you expect to do that?

A. Wouldn't expect to pay twice; no sir.

Q. Now, then coming to the general contract of

(Testimony of Charles T. Early.)

hiring which you referred to in your examination this forenoon, covering this transaction, which would he have gotten under that general contract of hiring, his expenses and \$75.00 a day, or a commission?

A. That would have been definitely settled at that time.

Q. In other words unless it was definitely settled at that time your general contract of hiring would not have covered it, would it Mr. Early?

A. I should think it would; maybe it wouldn't.

Q. Did you disclose to your Board of Directors at that time that you knew that Mr. Bates was working for the other people, for the Kerry interests? [180]

A. That is a question, Mr. Devine, that you could answer better than I could. You knew what my instructions were after I attended the first board meeting.

Q. Now, Mr. Early, I am not being examined.

A. All right.

Q. I wish you would answer my question.

A. All right, I will answer it. You instructed me to go to San Francisco and see what I could do, and then to exhaust every resource to dispose of this property; that you had to do something; you had to have money. If you didn't get it, you were going to lose it. That is the basis that I went on. We were grabbing at straws every direction as you know.

Q. Now answer my question, will you? Did you

(Testimony of Charles T. Early.)

disclose to the Board of Directors in the Kerry transaction, that you knew that Paul C. Bates was representing the Kerry interests in this deal?

A. I should think my telegram would disclose it. If that wouldn't I don't know what would.

Q. Other than this telegram you have no recollection in reference to it?

A. Yes, Mr. Eccles knew about it. I have letters from him, I think.

Q. So that your Board of Directors, as far as you know, and Mr. Eccles, President of the company, as far as you know, both and all understood at the time this Kerry transaction was going on, that Mr. Paul C. Bates was the agent and employee of Mr. Kerry and his interests?

A. Mr. Porter, yes.

Q. And not the employee or agent in that sale, of the Oregon-American Lumber Company? You were doing that?

A. I was doing what I could, yes.

Q. And you so understood that?

A. Yes, sir, that I was to do what I could.

Q. Yet you understood that he was not the agent or employee of [181] the Oregon-American Lumber Company in that transaction?

A. I understood that Mr. Bates was to have pay for his services, regardless of whether he made a single deal or not.

Q. In other words you understood, as I gather now from your remark, that your company was

(Testimony of Charles T. Early.)

going to pay the agent and representative of Kerry whether the deal went through or not?

A. Yes, sir, that was in my telephone instructions from San Francisco, that Mr. Bates was to do what he could to dispose of this property, and that we would see that he was properly compensated.

Q. Did you disclose that to Mr. Kerry in the transaction which you had with him, that our company was going to pay to his agent or employee, a salary, whether Mr. Kerry dealt with them or not?

A. I never discussed it with Mr. Kerry but once, and that was the day that we closed.

Q. I take it that you mean by that answer that you didn't tell Mr. Kerry that you were paying his agent?

A. No, I didn't tell him anything about it.

Q. I believe you said this forenoon that on the Inman-Poulsen deal you understood that Mr. Bates was representing the Inman-Poulsen people?

A. Yes, sir.

Q. But he was still, as you understood it, even during that period of time, your employee?

A. I would say, yes.

Q. So that you were in this novel position then, during the time you were carrying on these negotiations, of having your employee of your company, endeavoring to get the best of the deal as against the interests of your company. Is that correct?

A. Not at all; no, sir.

Q. Did you disclose to the Inman-Poulsen people

(Testimony of Charles T. Early.)

at that time that Mr. Bates, their agent and representative in negotiating their deal, was being likewise feed by your company?

A. No, sir, we didn't pay him. [182]

Q. It is a fact, is it not, that throughout the Inman-Poulsen deal, Mr. Bates was quite active in opposition to the interests of the Oregon-American Lumber Company?

A. Not to my knowledge. I don't think that is true.

Q. Will you examine the proposed Exhibit "D" and say whether or not that is a letter written by you in relation to the Inman-Poulsen deal?

A. Yes, sir.

Q. And as far as you know correctly recites the facts as you recall them, at that time?

A. Yes, sir.

Letter offered in evidence, received without objection and marked

Defendant's Exhibit "D."

OREGON

LUMBER COMPANY

Yeon Building, Portland, Oregon

Jany. 22d, 1921.

Mr. J. M. Eccles,

Ogden, Utah.

Dear Joe:

I now wish to refer to last telephone conversation that we had relative our closing with Inman-Poulsen people on one or the other of their propo-

sitions submitted through Mr. Bates, on January 15th, both of which were wired you in detail.

My best judgment was, everything considered, to close on 3200 acres and I sincerely hope that when yourself and associates analyze you will concur.

Full statement follows:

Cruise used, 340,000,000 @ \$3.00 \$1,020,000.00.

We have following to show for timber sold.

Receipts for taxes	\$	36,647.36
Receipts stamps—deed		680.00
Difference 4½ & 6%		20,000.00

Interest paid DuBois on the three hundred thousand notes cancelled—Jan. 1st to 20th	740.00
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Principal paid DuBois, for [183] which we hold receipt to be endorsed on note No. 1	8,316.00
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Draft sent Mr. Royal Eccles	452,000.00
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Inman Poulsen notes	180,000.00
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Receipt from P A & P R R	21,321.25
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Cash in bank	295.39
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Cancelled notes Oregon American	300,000.00
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\$1,020,000.00

Items that think you will not perhaps fully understand, will endeavor, to explain—first two, I think entirely plain and will pass. Third item of \$20,000.00 was an amount agreed upon between Mr. Poulsen and myself for the difference in interest of what old mortgage carried and what he had to pay—if his mortgage run the full time on full amount difference would have been in round figures \$29,000.00—time being 6 years, five months, and ten days and they wanted us to pay full amount in at first, which, of course very unfair—they in the end to reimburse us in event they paid Mr. DuBois less.

Impossible for any one to correctly foretell this amount, but, I felt it worth something to have it out of the way and Mr. Poulsen felt the same and claimed that he had not authorized Mr. Bates to say that we would be refunded at all.

Right or wrong: I did it.

The fourth item \$740.00 I think plain but will say again that it the interest on cancelled notes, which, our cashier has here. These will not annoy you further.

Now comes item number five of \$8,316.00 paid on principal that I am sure you will not understand without explanation. Mr. DuBois claimed on the lands sold \$306,160,000 feet, standing timber but wanted as might naturally be expected to pick out of the deal a little cash for himself—he had come a long way to aid in closing and wanted a mortgage from the Inman-Poulsen people for an even Three Hundred Thousand, so, he stood pat for that which

aided me very much in pulling Bates & Poulsen away from the idea that either our cruise or theirs should be [184] used—you can readily see, how much better for us to handle in the way that I did.

We have the receipt of Mr. DuBois for that amount as being a payment on note. Right here would like to say that I have had very satisfactory talks with Mr. DuBois, who, stands ready to aid us every way we in turn to assist him (if it comes handy to do so) in making our friend Mr. Kerry take some of his timber when exchange matters come up later as they surely will.

On any sales that we make—provided always they are made to reputable operators, he stands ready to release and made it so plain that we felt it would insult him did we insist on a contract to the effect as we had suggested and a contract with a stipulation such as he would insist upon (that the purchaser should be reputable operator and responsible) would put us in position right along of having still to get his permission.

Item six, speaks for itself. Item seven—four, Forty Five Thousand Dollar Notes, drawing 6% interest here in strong box for whatever disposition is desired.

Item eight. You may criticise this and I assume responsibility for it although, I was urged to go stronger. Situation though just this—we had to pay United Rental as to default that would put them where contract could be cancelled—besides that operating expenses had to be taken care of and these two items amount to nearly half of the

\$21,321.25—balance was for long overdue Board Bills, Grocery Bills, wages of Engineers, etc., etc.

Item nine self-explanatory—of course it will not long remain in the Bank as we will have to spend it.

Item ten, already covered. Now as to our position here.

We figured all of the time, that a sale enabling us to [185] pay our debts here would strengthen us, but, after we make this deal and are called upon to pass upon bills, send the money elsewhere and have to continue to stand off people that have been extremely lenient, but, are becoming naturally more and more insistent, really believe so far as this end is concerned are worse off than ever—to-day, has been exceptionally unpleasant—people calling for and insisting on payment.

We are not criticising anyone but giving you cold facts and you can rest assured that if the above condition long continues people here will think you are worse off than you are.

Past week the most strenuous for years—ever in fact and late Thursday night when we got closed even the “garrulous” Bates was tamed “Papa Poulson” having headed him in more than once.

Bates took one last stand on the rates—saying that if the P A & P could not guarantee rates the Oregon American could and that it was necessary that it be done—they wanted a rate on Logs and Booming of not to exceed \$3.50 per M.

Promptly told him such a procedure illegal, but, that even though there never was a trade it wouldn't be done and that it was now too late for

him to even suggest it—his hopes had been blasted prior on other matters, so, in reality he was in better shape for it.

I cannot close without again saying that Mr. DuBois, right, with us all the way through and while I had not anticipated it feel that his getting the \$8,316.00, which arrived at by taking 6,160,000' and figuring it at \$1.35 per M—the cutting price it having been removed from the mortgage and so far as he concerned from the ground, not, a bad investment, provided, we have other deals to put through. Could have differed with [186] him and might have won my point but, felt proper to do it in his case just what did do.

Got Mr. Poulson's check for \$520,000.00 and figuring \$20,000.00 interest in that is paid would make \$540,000.00. Attach "memo" way Bates had it figured on the 3200 acres as my wire to you will show.

Other prospects will be gone into thoroughly, Monday.

Sincerely,

CHAS. T. EARLY.

As of Jany. 15th.

Poulsen proposition as Bates figures—see wire and confirm.

340,000,000' @ \$3.00\$1,020,000.00

Mortgage to DuBois on our cruise of

359,000,000 \$1.00 per M 359,846.00

660,154.00

(Testimony of Charles T. Early.)

Deduct for interest difference	35,000.00
	<hr/>
	625,154.00
Cash to you	500,000.00
	<hr/>
	\$ 125,154.00

Last named amount in notes.

A glance at our statement first page my letter will show that our cash to Mr. Royal Eccles of \$452,000.00 and the Poulsen notes of \$180,000.00 more than he figured we would have left and besides that we paid lots of things and have "papa's" notes for much more than \$125,154.00.

C. T. E.

Q. In reporting as you did to Mr. J. M. Eccles the result of that transaction, you were making a report then to the representatives in Ogden of the transactions that had been carried on in the sale of a portion of their timber holdings to the Inman-Poulsen Lumber Company, were you not? [187]

A. Yes, I was completing a report; was a daily report made by telephone or telegraph.

Q. Now, isn't it a fact that at that time, as to Mr. Bates' activities as between the contracting parties, isn't it a fact you made this statement: "Past week the most strenuous for years—ever in fact, and late Thursday night when we closed even the 'garrulous' Bates was tamed 'Papa Poulsen' having headed him in more than once." Papa Poulsen was his father-in-law, was he not?

A. Yes.

(Testimony of Charles T. Early.)

Q. "Bates took one last stand on the rates—saying that if the P. A. & P. could not guarantee rates, the Oregon-American could, and that it was necessary that it be done—they wanted a rate on logs and booming of not to exceed three fifty per thousand feet." That is your report, isn't it?

A. Surely.

Q. So at that time he was not working for the interests of the Oregon-American Lumber Company, was he?

A. Well, that is a question of rates there, that he was trying to get fixed, that was delaying the transaction.

Q. For whose benefit was he working when you made the statement?

A. In that instance it would be in the interest of the Inman-Poulsen Company.

Q. Do you mean now to say that during the time he was making this negotiation in this fashion, he was still under general contract of employment as an employee of the Oregon-American Lumber Company?

A. Oh, I don't claim that, because that isn't the case.

Q. That isn't the case. When did this general contract terminate with this, if it isn't the case?

A. When I 'phoned from San Francisco, if it was changed at all it was changed then. It is my understanding it was.

Q. The commissions that were paid on these deals, did you get any portion of them?

(Testimony of Charles T. Early.)

A. Yes, sir. [188]

Q. How much? A. \$17,000.

Q. \$17,000. Was that during the time you were still an employee of the company, too?

A. Yes, sir, but I didn't make the price on the timber and had no understanding as to commission.

Q. Did you report that fact to any officer, or to your Board of Directors?

A. No, sir, because I didn't make the sale.

Q. Do you know who else shared in these commissions? A. No, I do not.

Q. Do you know whether anybody else did or did not? A. No, I do not.

Q. So as a matter of fact, while Bates represented Inman-Poulsen in the deal, and you now contend that the Oregon-American Lumber Company had him under a course of general employment, and he at the same time in turn had you under employment? A. Who did?

Q. Bates? A. No, he did not.

Q. Well, he paid you \$17,000 anyway, didn't he?

A. Yes, he did.

Q. What for?

A. I don't know what for. He said simply he would have to pay it to the Government on his income tax if he didn't.

Q. You don't know what he paid it to you for at all? A. No.

Q. You never even reported that to Mr. David C. Eccles did you? A. I did not do that.

Q. That was one of the things that you never

(Testimony of Charles T. Early.)

took up with anybody in connection with the company? A. No, sir.

Q. Did you ever account to the company in the trust capacity that you then held as its vice-president—did you ever account to the company and turn back into its treasury this \$17,000?

A. No, sir, because I didn't take account of it. It didn't belong to them. [189]

Q. During all this time that you were receiving this commission from Paul Bates upon the transactions that were being carried on by your own people, you were drawing a salary from the Oregon Lumber Company of something like \$12,000 a year, were you not? A. No, sir.

Q. How much? A. \$8,700.00.

Q. And how much expenses?

A. It depended on what they were.

Q. Didn't you have an annual allowance for expenses of something over \$5,000? A. No, sir.

Q. Now then, with reference to these various transactions, what would have been your commission on the Kerry deal with Mr. Bates had it gone through?

A. Wouldn't have been anything as far as I know.

Q. What is your understanding with him in that respect? A. Didn't have any.

Q. But in every deal in which you sat upon one side of the table as an officer of the corporation, and Mr. Bates upon the other buying from your

(Testimony of Charles T. Early.)

company, and a commission was paid, you got your share of it, didn't you?

A. No, sir; I did not. Do you want to know about another transaction? I will be glad to tell you.

Q. I will ask you about the transactions, Mr. Early, as I come to them. At the time that this deal was made, this Inman-Poulsen deal, you understood that a financial crisis had come on the country, and that you had been called to Ogden to meet with the Board of Directors a short time prior to that, and were fully informed as to the desperate financial condition of the Oregon-American Lumber Company, weren't you?

A. Yes, sir.

Q. And at that same period of time, acting in the trust capacity that you did in that deal, you wrote this letter that has last been introduced in evidence here, Exhibit "D," begging that the [190] funds that arose from the sale of this property be left here in any small amount that was possible, to meet the many demands that were being made upon the company, didn't you?

A. Yes, sir.

Q. And at the same time you, as vice-president of this company, received a cutback upon the price that was being paid here of \$17,000, and made no accounting to your company on it?

A. I received that some time later, yes. The company had nothing to do with it.

Q. The only thing the company had anything to

(Testimony of Charles T. Early.)

do with as far as you were informed is when you were working for them, when you were employing Bates. That is correct, isn't it?

A. Oh, no; no, sir.

Mr. DEVINE.—If the Court please, there is such a mass of other matters that have been carried in by all of these various touchings of counsel throughout the number of transactions that I have gone into here that it would take a much longer time. I didn't anticipate that these would have to be met in the early portion of the case, and I want to reserve the right, if it becomes necessary, to recall this witness for further cross-examination upon other details than those which he has already been examined on, and in the submission of records, if it becomes necessary. I don't care to take the Court's time at this time to do it.

COURT.—I understand from plaintiff's counsel that he will probably be recalled.

Redirect Examination.

(Questions by Mr. WILBUR.)

Mr. Early, as I understand it now, with this Inman-Poulson deal and another deal you did get two commissions? A. Yes, sir.

Q. The first one was the one you testified about on cross-examination this morning, when Mr. Bates had felt that he would [191] be glad to give you something, and gave you at that time \$17,000 you said? A. I think so.

Q. And what was it you said this morning about taking that up with Mr. Eccles, the president of

(Testimony of Charles T. Early.)

the company, before you accepted it? I want the jury to understand that.

Mr. DEVINE.—I object to that as not being re-direct examination. That was a volunteered statement, his own explanation of his own conduct. And, further than that, if the Court please, Mr. David C. Eccles, as president of the company, would not change the situation whether put up to him or not.

COURT.—Only for the purpose of clearing up the testimony, that is all. He said something about that.

Q. Yes, I want to know just what was done by Mr. Eccles relative to the first \$17,000 commission.

A. The first time it was mentioned to me by Mr. Bates I told him I couldn't accept it without first taking it up with Mr. Eccles. If it was entirely agreeable to him—

Q. Mr. Eccles was president of the company?

A. Yes, sir—I would be glad to have it and I appreciated his willingness to give it to me. And he had already, I found, discussed it with Mr. Eccles.

Q. Who had discussed it?

A. Mr. Bates. Mr. Eccles told me when I approached him, he said it was perfectly all right. He said if he wants to give all his commission to you I haven't any objection. That covered the first transaction.

Q. And thereupon you accepted it?

(Testimony of Charles T. Early.)

A. Yes, sir.

Q. Now, on the other one that counsel has been talking about here this afternoon, on the Inman-Poulsen deal, and I was asking you this morning about these various things—is that Inman-Poulsen deal in this transaction at all, upon which we are suing? A. I think not. [192]

Q. For compensation? A. No, sir.

Q. You think not? A. I am sure it isn't.

Q. Now, in the first instance, relative to the Inman-Poulsen, so the jury will understand it; may it please the Court, there has been thrown out certain ideas and hints here, and I want to clear it up. On the Inman-Poulsen deal, who first employed Mr. Bates? Was he employed by you or not? Just tell the jury.

A. Well, there had been an Inman-Poulsen transaction up. I think two or three different transactions, been a couple of times anyway. Not just the same each time, but that was revived after the company got into financial difficulties. And that transaction was ultimately consummated, after authority was obtained from Mr. Devine and other members of the Board at Ogden, and I never dreamed of getting any commission from Mr. Bates, or any part of what the Inman-Poulsen people paid him.

Q. Now, in the first instance, was Mr. Bates working in the Inman-Poulsen deal for the Oregon-American, or for Inman-Poulsen?

(Testimony of Charles T. Early.)

A. Well, he took it up at my suggestion, endeavoring to find people that would buy. He took it up with Mr. Collins and Inman-Poulsen, and anyone else that he thought might be interested in that timber, and that was one of the prospects that he took up at that time.

Q. And was there any discussion or division in price as between Inman-Poulsen and the Oregon-American and yourself?

A. Yes. For instance, when I was over at Ogden, I think they authorized me to make a price of two dollars, or something like that, that is on the whole timber but when I got up here I had a different idea of the value of the timber than they had and I thought I could get considerable more, and the first price to Inman-Poulsen was, I think \$3.50; \$3.25 or \$3.50. [193]

Q. Was there any agreement later, after you had told Bates to take it up with whomever he could—any agreement later that whatever payment on that particular deal Mr. Bates got, had to come from Inman-Poulsen?

A. Oh, yes. He finally made a proposition in writing, as I remember, he would give so much net, I think \$3.00 net.

Q. On the Inman-Poulsen deal? A. Yes, sir.

Q. Who made that proposition?

A. I think Mr. Bates made it.

Q. For Inman-Poulsen? A. Yes, sir.

Q. That was a change, then, from the original proposition? A. Yes, sir.

(Testimony of Charles T. Early.)

Q. But it was to be net to you?

A. Oh, yes, his letters so stated and I advised him of the fact.

Q. And that anything that Bates got out of it in the way of compensation, he had to get from Inman-Poulsen? A. Surely.

Q. And on that Inman-Poulsen deal was any money paid to Mr. Bates at all from the Oregon-American? A. No, sir.

Q. And I understand you to say that Mr. Bates is not asking for compensation for this. So that the money that Mr. Bates got, and where he gave you a portion of it, was money that he got from Inman-Poulsen, and not from the Oregon-American? A. Surely.

Q. Now, this timber that was sold to the Inman-Poulsen people was sold for, you say, \$3.00?

A. That is my recollection.

Q. \$3.00. A. \$3.00 per thousand.

Q. And as to the price which you were getting from Inman-Poulsen through Mr. Bates and yourself from Inman-Poulsen, after that did you take that up with Mr. Devine? A. Yes, sir.

Q. And was that sale authorized? A. Yes, sir.

Mr. DEVINE.—If he took it up with me, he took it up by letters, and the conclusion is best expressed by the letters. We object to hearsay testimony. [194]

Mr. WILBUR.—I ask for the contents of the letters. If you think he didn't take it up with you, you have the letters and had better produce them.

(Testimony of Charles T. Early.)

Q. That price was authorized?

Mr. DEVINE.—We object as calling for—

COURT.—If that was in writing the writing is the best evidence.

Q. Did you take it up in writing with them?

A. I was reporting to them from one to three times a day over the telephone, as to the status of these various deals and—

Q. Who did you take it up with by letter?

A. I don't know. I think I probably wrote Mr. Devine and Mr. J. M. Eccles; I was reporting to pretty nearly everybody at that time.

Q. Did you take it up by telephone? A. Yes.

Q. Who did you take it up with by telephone?

A. Talked to Mr. Devine and also to Mr. J. M. Eccles.

Q. What was said over the telephone by Mr. Devine about the price of \$3.00?

A. They authorized an acceptance to close it as soon as possible.

Q. Mr. Devine authorized that over the phone?

A. Yes, sir.

Q. That was the \$3.00 sale. As a matter of fact when they sold out to Keith they only got \$1.78, didn't they?

A. I didn't understand it was so much but it might have been. I thought it was less than \$1.50.

Q. In other words, you got about \$1.22 or \$1.50 more than they got when they sold it, didn't you?

A. Got far more.

(Testimony of Charles T. Early.)

Mr. DEVINE.—Who is “they”? I understand you are claiming here you did that.

Mr. WILBUR.—We will show you some evidence on that before we get through. [195]

Q. How much did they pay for it a thousand?

A. I couldn't say. My understanding was about \$1.50 for the timber. A little less than that.

Q. In other words, you and Mr. Bates in the Inman-Poulsen deal got approximately twice as much as they paid for it?

A. We got more than twice what the Oregon-American paid for it, and I think about twice what the other people paid.

Q. Now you continued to be an officer and representative of the company, you have said, of the Oregon-American here in this state, up to what time?

A. I couldn't give you the date. I think it was late in 1921, or very early in 1922.

Q. Was that before or after the sale of the stock of the Oregon-American to the Central Coal & Coke Company? A. Why, I think that was after.

Q. After the sale to the Central Coal & Coke?

A. Yes, I know I resigned so Mr. Keith could put his own men on the Board.

Q. During the time that the Eccles were interested in them, you were in this position in Oregon?

A. Yes, sir.

Q. And ceased to be in that position when the property was taken over by Keith, of the Central Coal & Coke Company of Kansas City, Missouri?

(Testimony of Charles T. Early.)

A. Yes, sir.

Q. Now, relative to the Kerry deal counsel has been talking about, how did Mr. Bates become first interested in that matter? Was it through any instructions from you, or instructions from the other side, or how?

A. I think that transaction started through Mr. Porter.

Q. Through Mr. Porter? A. Yes, sir.

Q. Mr. Porter was with Kerry, or logging for Kerry? [196]

A. Well, he was independent, and I think he was first investigating on his own responsibility. But he can say as to that better than I.

Q. Now, as to what transpired between Mr. Porter and Bates, as to how they got together, of your own knowledge, I presume you don't know?

A. No, I don't.

Q. I will ask you this question: Whether or not from your own contract or understanding with Mr. Bates, as you had that in July and August, 1917—whether or not under that Mr. Bates was authorized to act for you with Mr. Kerry or with anybody else?

A. Well, that would probably have been authorized, but it wasn't contemplated at the time the arrangement was made. As I testified before noon, it was much longer drawn out and got into a great many more ramifications than we ever anticipated it would.

Q. Now you said in your cross-examination that

(Testimony of Charles T. Early.)

the first time Mr. Kerry saw you you told him that the property wasn't for sale?

A. I did, yes, sir, and at that time it wasn't.

Q. Why was it that the property wasn't for sale when you first—

A. Well, they were trying to finance it, and wanted to hold it, and then particularly were they averse to selling any timber that would furnish tonnage to this railroad that was then under construction.

Q. Had Mr. Bates, as far as you know, had anything to do with Mr. Kerry up to that time, or with Kerry interests?

A. Well, nothing more than kind of going over his railroad properties, I think, when he was looking for an outlet.

Q. I mean as to the sale of the timber?

A. I think not, prior to that.

Q. Then you saw Mr. Kerry after that, when?

A. I saw Mr. Kerry on a Sunday morning. He and his attorney called at my office. [197]

Q. I mean after the time that you had told him that the property was not for sale. Did you have any subsequent talk with him when you told him the property was for sale?

A. I don't think I told him. I don't think I saw Mr. Kerry any more until he was in my office. I wouldn't be positive, but that is my best recollection.

Q. So that the reason for Mr. Kerry coming to

(Testimony of Charles T. Early.)

your office was due to some other influence, you don't know what that was?

A. Well, that was brought about by Mr. Bates and Mr. Porter.

Q. When you had that meeting on Sunday morning, which you say you had there in your office, when was it you say—January 5th?

A. No, no, December 5th.

Q. December 5th; what year? A. 1920.

Q. Who notified you that Mr. Kerry and his attorney Mr. Powell, of Seattle, would be in your office? A. Mr. Bates, as I recall.

Q. Mr. Bates notified you they would be there?

A. Yes, sir.

Q. And at that time between Mr. Kerry and yourself, representing the Oregon-American, what was done relative to the sale, or disposition of that 2400 acres—wasn't it? A. Yes.

Q. 2400 acres to Kerry?

A. Well, the offer had been accepted prior to his coming. There was only a question as to whether or not he could not be induced to pay down additional money. I forget just the amount he was paying. I think it was \$250,000, and that was discussed. And then there was another question about this 2400 acres being released from a general mortgage. When the property was bought there was a million dollars paid on it and a mortgage given on the entire property for \$2,650,000. And if he closed the deal in line with their offer and our acceptance, he wanted the 2400 acres released from

(Testimony of Charles T. Early.)

the general mortgage, and to carry the four and a half per cent rate of interest which the general mortgage did. [198]

Q. That is you mean release the 2400 acres from the general mortgage, and give back a mortgage on just the 2400? A. Yes.

Q. And bearing interest at what per cent?

A. $4\frac{1}{2}$.

Q. What agreement did you make with Mr. Kerry on that line?

Mr. DEVINE.—Just a moment. All these agreements were in writing, weren't they, to Mr. Kerry—this proposal? A. Yes, I think so.

Mr. DEVINE.—Object to that as not the best evidence.

Mr. WILBUR.—I would ask the defendant in this case to produce a letter written by Mr. B. L. Porter to Mr. Paul C. Bates, of Portland, Oregon, November 8, 1920, relative to the disposal of this property. I have a copy here if you haven't the original and are satisfied that this is a copy. We can use this.

Mr. DEVINE.—I believe we have the original.

Q. I will ask if this is a writing or a copy of the writing or proposition that was made by Porter to Bates, to submit to you, his principal?

Mr. DEVINE.—I object to the last portion of that as a conclusion. The letter speaks for itself as to what it is.

COURT.—The letter speaks for itself.

Q. We will refer to it as a copy of it.

(Testimony of Charles T. Early.)

A. That is one of them but there were a number of them.

Offered in evidence, received without objection and marked

Plaintiff's Exhibit 3.

(Copy) Portland, Oregon, November 8, 1920.
Mr. Paul C. Bates,
 Yeon Building,
 Portland, Oregon.

Dear Sir:

You are hereby authorized to submit to the owners [199] Oregon-American Lumber Company or Mr. D. C. Eccles, an offer to purchase timber land described as follows:

Southeast quarter of Section 32, Southwest quarter of Section 33, South Half of Section 34, Southwest quarter of Section 35, and South Half of Section 36, in Township 5 N. 6 W. Also Northwest quarter of Section 5, North Half of Section 4, Southwest Quarter of Section 4, West half of Section 3, North Half of Section 2, all situate in Township 4 North, 6 W., aggregating 2400 acres.

I am willing to pay on a basis of \$3.00 a thousand stumpage, one-half cash and the balance on contract in two years with deed to the land, deferred payments to bear 6% annual interest. I will agree to pay the balance on each quarter section before starting to log, should logging begin prior to date of maturing of deferred payments.

(Testimony of Charles T. Early.)

I should expect signed cruises from the owners showing actual amount of standing timber on the above lands accompanied by an option for thirty days for the purpose of checking said cruisings. On or before expiration of the option I will be ready to close the deal.

Should ~~you~~ be glad to have you take this up with the owners and advise me as soon as you can whether they will consider this proposal.

I remain,

Yours very truly,

B. L. PORTER. (Signed)

Q. Was that referred to you by Mr. Bates, handed to you or not, or when Bates got it, what did he do with it, do you know?

A. That was handed to me or one similar.

Q. What did you do with it?

A. Declined his offer, as I remember it. [200]

Q. Was it communicated to the home office at Ogden or Salt Lake?

A. Why, they must have been furnished a copy. I wouldn't say about the original. It was perhaps kept in the files here.

Q. Now, on this visit on Sunday, did you come to any conclusion or any agreement with Mr. Kerry about the sale?

A. According to my understanding the sale—

Mr. DEVINE.—Just a moment—

Q. What was said? Counsel objects to the understanding. Recite as near as you can the conversation on the substance thereof.

(Testimony of Charles T. Early.)

A. The price and the terms had been agreed upon prior to this meeting. This meeting was for the purpose, as I testified a while ago, to see if we couldn't get a larger payment in cash, and it was with the understanding that we could get this 2400 acres released from the general mortgage, and Mr. Kerry didn't care to pay any more money than his written proposition, down, and said they were ready to close whenever we got the release from Mr. DuBois, Mr. DuBois holding the original mortgage. And he left with the understanding that it was our move and he was ready to take the property whenever the release was furnished.

Q. What understanding was there as to the rate of interest?

Mr. DEVINE.—That is all in writing, as I understand it. Was it not? A. Yes, sir.

Q. On Sunday?

A. Oh, the writing had been carried on, this exchange of letters sometime prior to this Sunday meeting.

Q. On this Sunday, was no writing on that day, was there? A. No, sir.

Q. Wasn't any writing about this deal after that, was there?

A. No, the terms, as far as the price of the timber and the rate of interest, that had all been settled. It wasn't discussed at the Sunday meeting.

Q. I am asking you about the conversation on this day. Was that [201] or was it not reduced to writing? A. No, it was not.

(Testimony of Charles T. Early.)

Q. What was the understanding there as to the rate of interest? A. Four and a half per cent.

Q. Were the terms of the payment agreed on that day? A. Yes, sir.

Mr. DEVINE.—This was oral entirely. I think this man can state what was said. This is asking for a conclusion, and if the terms of payment were agreed upon, is asking for a conclusion. He can state what was said.

COURT.—State what was said.

A. I asked Mr. Kerry if he couldn't make a larger cash payment. He said not very well, they were willing to go through with the deal as per their offer provided we could get the 2400 acres released from the general mortgage, which I felt that we could, and promised him that we could, and he left the office understanding that we would expedite that part of the transaction as much as possible, and whenever we were in a position to release it, he was ready to close.

Q. What was said there as to the amount to be paid down, and the balance of the mortgage to be given?

A. Those matters were simply referred to. I couldn't give you the exact figures. They were referred to as the amount stipulated in their offer.

Q. What was the full amount of that consideration, if you remember?

A. I think it was something over \$800,000.

Q. I show you a telegram here and ask you if you send this telegram to Mr. Devine?

(Testimony of Charles T. Early.)

A. Yes, sir.

Q. That was sent from Portland? A. Yes, sir.

Q. To Mr. Devine at Ogden? A. Yes, sir.

Offered in evidence, received without objection
marked [202]

Plaintiff's Exhibit 4.

WESTERN UNION TELEGRAM.

Portland, Oregon, Nov. 27, 1920.

Mr. J. H. Devine,
Ogden, Utah.

Have tried hours to get you on the phone without success and now wish to advise of having closed with Inman-Poulsen on three hundred sixty-seven million feet at three dollars net, having persuaded them to take the additional westerly from descriptions you have there and closing date to be on or before December thirty-first with their assurance that will expedite and try and close by December fifteenth. Half million cash with difference between mortgage and cash covered by year note bearing six per cent interest and checkers will go in to timber Monday to verify our cruise which must in any event be accepted. Stop. Porter sitting pretty tight on his original offer, which we thought best not to accept the other day, but which could be accepted to-day if think best and if sold at his figure would carry two and half per cent commission, Bates. Call me on the phone quick.

CHAS. T. EARLY.

(Testimony of Charles T. Early.)

Q. Will ask you if you sent this telegram of November 28, 1920, to Mr. Devine? A. Yes, sir.

Offered in evidence, received without objection, marked Plaintiff's Exhibit 5 and read as follows:

Plaintiff's Exhibit 5.

WESTERN UNION TELEGRAM

Portland, Oregon, Nov. 28th, 1920.

Mr. J. H. Devine,
Eccles Building,
Ogden, Utah.

Met Porter to-day and declined his offer of eighth which you have [203] and made him definite proposal as follows. Timber at three twenty-five per thousand, he assuming the mortgage and pay our equity in cash indicating if impossible to pay all cash might consider reasonable time on portion. Stop. He makes new offer as follows: Three dollars and fifteen cents per thousand which would approximately total eight hundred and nineteen thousand, the assuming the mortgage approximating three hundred and fifty-one thousand, leaving balance of four hundred and sixty-eight thousand of which one-half would be paid in cash, remainder on or before two years at six per cent. Stop.

Rather think can do no better as to price, but do feel that might insist on larger cash payment with success and divide the time paper into one or two years which preferable to on or before. Stop.

Digest the above and call me phone as early tomorrow as possible, please.

CHAS. T. EARLY.

(Testimony of Charles T. Early.)

Q. Mr. Early, did you send this telegram to Mr. Bates at San Francisco, relative to this deal? Is that the original telegram? A. Yes, sir.

Mr. WILBUR.—I offer it in evidence.

Mr. DEVINE.—I object to that as absolutely immaterial to any issue in this case.

Mr. WILBUR.—We think it is material. This witness was at that time, so we think we have shown, the general manager, or apparent manager of the company, and it is a telegram to Mr. Bates.

Mr. DEVINE.—The witness has just said that his authority changed. It is a self-serving instrument from this man to Bates, and it is entirely beyond the issues of this case.

COURT.—This is a question can be determined hereafter. [204]

Objection overruled for the present.

Exception saved.

Telegram marked Plaintiff's Exhibit 6 and read as follows:

Plaintiff's Exhibit 6.

WESTERN UNION TELEGRAM.

December 2, 1902, Portland, Oregon.

Paul C. Bates,

care Palace Hotel,

San Francisco, California.

Have just advised Porter our acceptance their last proposition he assuring me that definite dates would be made on notes and will try to get addi-

(Testimony of Charles T. Early.)

tional cash payment stop Is now phoning to arrange for meeting date for written commitments.

CHAS. T. EARLY.

Recross-examination.

(Questions by Mr. DEVINE.)

Mr. Early, the proposition which you have discussed here as taking place on Sunday, being a general discussion between you and Mr. Powell and Mr. Kerry, was here in Portland, wasn't it?

A. It is not a general discussion.

Q. Well, we will say a very particular discussion; but at any rate at that time, as I understood you, some letter or commitment had passed between the Oregon-American Lumber Company and Mr. Porter? A. I think so.

Q. Have you that copy? A. Have it?

Q. Yes.

A. I may have, Mr. Devine, I will be able to look.

Q. I won't ask you to take the time now. I haven't a copy of it, and I wish when you are released from the stand here you would look through your files for it.

Q. The Sunday discussion that you spoke of took place on December 5, 1920, didn't it?

A. That is my recollection, yes, sir.

Q. That is a letter written by you to David C. Eccles, the president [205] of the company?

A. Yes, sir.

Mr. DEVINE.—I offer this in evidence.

Marked Defendant's Exhibit "E" and read as follows:

Defendant's Exhibit "E."

December 5, 1920.

Mr. David C. Eccles,
Ogden, Utah.

Dear Sir:

Mr. Kerry and a Mr. Powell, an attorney from Seattle, also a stockholder in the Kerry companies, have just left after spending more than an hour here discussing the proposed deal and various things among which general conditions.

Mr. Powell says that as he views the matter it all contingent on what Mr. DuBois does and with that in shape, intimates that meeting of their stockholders can be called and deal ratified.

They feel cannot deviate from the terms proposed, viz.: cash \$234,000, two year note like amount and of course the assumption of the DuBois mortgage; however, I feel that when we do get definitely in shape that we can do something better on terms, or rather payments, but no use going in to it to-day as we are not closing. Amounts I have given above are approximately correct.

Leave for Baker to-night. Expect to go through to Prairie to-morrow and back to Bates. From there to Baker and will probably be there all week, so can reach me there with mail or wires.

Yours truly,

CHARLES T. EARLY.

(Testimony of Charles T. Early.)

Q. "Going back to Bates" here happens to be a town, doesn't it, Mr. Early? A. Yes, sir.

Q. Now you understood at the time you wrote that letter that Mr. Kerry's proposal was based upon the fact that he must get the [206] ratification of his Board of Directors or stockholders in order to conclude this deal, didn't you?

A. Yes, that was my understanding. It was my understanding also that he was the whole thing as far as the stockholders were concerned.

Q. At any rate he and his representative, Mr. Powell, made the reservation then and at all times, contingent upon what they might do at the expiration of the option, which was January 25, 1921, wasn't it?

A. Well, not exactly. Mr. Kerry and Mr. Powell left and said that if we got—Mr. Kerry particularly said that if we got the release he was ready to close; that they would—the stockholders and board would do whatever he said. Mr. Powell was one of the Board and he was the other, and there was only three, I think, on the Board.

Q. At any rate that was the reservation you referred to your company, wasn't it?

A. Yes, and of course naturally and sale would be ratified.

Q. Now, as a final conclusion to this whole matter, the Oregon-American Lumber Company, through you, accepted in total every condition of the written instrument, and you submitted to Mr. Kerry deeds

(Testimony of Charles T. Early.)

covering the property, together with abstracts, on the 4th day of January, 1921, didn't you?

A. I couldn't say as to that; they were submitted at the same time.

Q. And the Oregon-American Lumber Company, as far as the written proposition from Mr. Kerry was concerned, prior to the exercising of his option, had submitted to him acceptance of all particulars of his written option, hadn't they?

A. We accepted his proposition. I am not certain whether the final proposition was in writing or not. I think it was.

Q. And after that, having submitted papers on behalf of your [207] company carrying out the deal identically as he proposed it he exercised his reservation to submit it to his stockholders, and told you that he wouldn't accept it; and made you a counter proposal to trade timber, didn't he?

A. No, sir.

Q. This is a letter from you to Mr. Powell, isn't it?

A. To Mr. Kerry.

Q. To Mr. Kerry I mean.

A. Yes, on an entirely different proposition. Absolutely had nothing to do with the other deal.

Mr. DEVINE.—I offer it in evidence.

Mr. WILBUR.—I understand Mr. Early has said this is an entirely different proposition. I don't think it makes any difference, but don't think it is anything to do with the case.

Mr. DEVINE.—I disagree very heartily with that statement, and contend it has to do with the

transaction under discussion here, and offer it for that reason.

Exception saved.

Marked Defendant's Exhibit "F" and read as follows:

Defendant's Exhibit "F."

January 7, 1921.

Mr. A. S. Kerry,
C/o Mallory Hotel,
Portland, Oregon.

Dear Mr. Kerry:

This will acknowledge receipt of your letter of yesterday, together with plat and legal descriptions of timber to which your letter refers.

I could not recommend to my people that they entertain the proposition that you make, and I regret very much that the original deal has gotten into the shape that it has. It has been my thought since talking with Mr. Powell and yourself on December 5th., that the closing depended altogether on the willingness of Mr. Dubois to release the timber in question, and when [208] we were finally advised it was agreeable to him to do so, I had deed prepared and the same is now executed conveying the timber to your company. Further than that I had abstracts brought down to date, which are now in my office, feeling, as I have already stated above.

It places the writer in a rather embarrassing position with his people, but as they have been advised of every move made, think will fully un-

(Testimony of Charles T. Early.)

derstand all when your letter of yesterday is placed before them.

Yours very truly,

OREGON-AMERICAN LUMBER COMPANY.

By Chas. T. Early.

Q. Now, Mr. Early, you don't mean to say that that reference to the original transaction in that letter is something different and another transaction than you have been testifying about here?

A. There is this difference: The original transactions was agreed upon as you know. The sale was authorized by you, and a rate of $4\frac{1}{2}\%$ interest was promised Mr. Kerry. That was promised in writing and you undoubtedly have the original letter. On January 2d, without my knowing it, Mr. Kerry was advised that the rate would be raised from $4\frac{1}{2}\%$, which he had been promised verbally but not in writing, to 6% .

Q. Who advised him of that?

A. Who advised him?

Q. Yes. A. Mr. Paul Bates, I think.

Q. Mr. Paul Bates?

A. Yes, and that is what spoiled the first deal. Then Mr. Kerry made another proposition which was largely a trading proposition and included some of the same timber, but much that wasn't in the original deal.

Q. Isn't it a fact that when Mr. Paul Bates during your absence from Portland, Oregon, and while you were in Baker, Oregon, in [209] some fashion got in touch with Mr. Kerry and said that

(Testimony of Charles T. Early.)

your company was going to insist upon 6%, and you were advised of it, and that you called your principals at Ogden and were advised immediately to inform Mr. Kerry that Mr. Bates had no authority in that particular, and you did write a letter to Mr. Kerry advising him that you would adhere to the 4½%?

A. I think that is true, but the deal was spoiled.

Q. That is true. But it wasn't until three days after you advised Mr. Kerry that Mr. Bates had no authority to interfere in any fashion with the rate of interest that Mr. Kerry exercised the option and determined not to purchase the property?

A. I couldn't say as to the length of time.

Q. But it was about that, wasn't it?

A. Couldn't be very long from the 2d to the 7th.

Q. And it is a fact too, is it not, that you advised Mr. Bates that he had no authority to represent the Oregon-American Company in a discussion of the interest problems with Mr. Kerry?

A. I told him that he had no business to go to see Mr. Kerry and try to repudiate the written and verbal understanding that we already had. And I told Mr. David C. Eccles the same.

Q. And when you wrote the letter of January 7th, when you wrote stating to him that you had all of your papers prepared, your deeds ready and executed, your abstracts ready, you expected and so advised him that you would carry the transaction through as far as the Oregon-American Lum-

(Testimony of Charles T. Early.)

ber Company was concerned, upon the identical basis agreed upon, didn't you? A. I think so.

Q. So that your company at no time, or at all, ever repudiated in any particular, or at all, the deal with Mr. Kerry, did they?

A. I couldn't answer that. Other people will have to answer that for themselves.

Q. But as far as you are informed, that is the fact, isn't it? [210] A. No, sir; it is not.

Q. And other than the interference that Mr. Bates injected into the deal, and which you repudiated on behalf of your company, you know of no other change or proposal made by any other person or persons, do you?

A. I am convinced that there were other parties mixing in it, but they can testify for themselves. I can't testify for them.

Q. There was nobody authorized, as far as you were concerned, as a representative of the Oregon-American Lumber Company at that time—there was nobody advised by you to change the deal in any particular, was there?

A. No, sir; I wouldn't have stood for it, because I had agreed to do a certain thing, and my company was bound to have gone through on that basis.

Q. And your company stood directly back of you on your advices from your superiors at Ogden, on that platform, didn't they? That they would go directly through?

(Testimony of Charles T. Early.)

A. Yes, I don't think they were trying to repudiate that at all.

Q. As a matter of fact, you didn't feel during that period of time, or at any other time, that after a deal was accepted by the company at Ogden, Utah, that you had any authority to change it, did you? A. No, sir; I did not.

Q. You didn't have any such authority?

A. Never attempted to go over the head of my superiors.

Q. And as far as you knew, outside of the people at Ogden, Utah, nobody else had authority to direct you in any phase of this dealing with Mr. Kerry, did they?

A. They were not directing me. There were other people that had authority, Mr. Devine. You know about that better than I do.

Q. Who were they? A. Mr. David C. Eccles. [211]

Q. Did he have authority at that time?

A. I don't think it had been taken away from him. You said it was going to be, but I don't think you had notified him.

Q. I hand you herewith, Mr. Early, a deposition taken in this case, to which is attached a letter dated Portland, Oregon, January 6, 1921, purporting to be signed by A. S. Kerry, and addressed to Charles T. Early, asking you if this is the first advice that you received from Mr. Kerry in respect to the closing of this proposed Kerry deal?

(Testimony of Charles T. Early.)

A. From Mr. Kerry direct, I think that is true.

Q. This is the first intimation that you had, or the first advice that you had that the written proposal from the Oregon-American Lumber Company submitted to the Kerry people was not accepted?

Mr. WILBUR.—He said the first direct.

A. The first from Mr. Kerry. I got into Portland either January 1st or 2d, and learned about the change in this rate of interest, which I understood had caused Mr. Kerry to demur, and that it would perhaps spoil the deal, and that was really the first information, but this is the first that I had direct from Mr. Kerry, and my answer to that was written after consulting with the president, Mr. David Eccles.

Q. You were advised from Ogden, Utah, as early as October, 1920, that every transaction from that time on with reference to the Oregon-American Lumber Company, the Portland, Astoria & Pacific Railway Company, and the Nehalem Boom Company, as far as the stockholders were concerned, must be approved by myself, were you not? A. I think so.

Q. So that you knew, when you returned to Portland, Oregon, in January, 1921, that no person had any authority to change any of the items of the proposal to the Kerry people, with reference to the sale of this timber, didn't you? [212]

A. That was the understanding I got over that. That you were to notify all parties who had been

(Testimony of Charles T. Early.)

handling it that they wouldn't have authority any longer. I don't know whether you did or not.

Q. But you knew, and immediately acting upon that knowledge, notified Mr. Kerry that no matter what Mr. Bates had said to him about interest rates, that those stated in his proposal still maintained?

A. Oh, yes, I advised Mr. Kerry.

Mr. DEVINE.—Since this is a part of the deposition, I will ask to introduce it in the record by reading it.

Read as follows:

Portland, Oregon, January 6, 1921.

Mr. Charles T. Early,

Oregon Timber Company,

Portland, Oregon.

Dear Mr. Early:

Concerning the proposition you made to sell our company two hundred and sixty million feet of timber in Twp. four, five and six, I find that our stockholders are afraid of present conditions and are therefore not willing to buy. Personally I am willing to take a chance and have quick assets to the amount of about \$140,000.00 that I will place at the disposal of our company to be returned to me when they have sufficient funds available to pay. I am sure that they would go with me on this as it was the three and not the six and a half year note that frightened them.

I am anxious to block our holdings and take what you have on top of Green Mountain and trade you

(Testimony of Charles T. Early.)

what we have that would come on an adverse grade to our road. If you will agree to trade us lands described on separate sheet for our lands, also described on sheet, we will pay the difference (less the DuBois mortgage \$1.35 M with 4½% in cash.

* * * * *

[213]

Q. Now the letter that I showed you a moment ago that bears the identification mark "F" is in answer to this letter, is it not? (No answer.) Now, Mr. Kerry's letter here where he says "I am sure that they would go with me on this as it was the three and not the six and a half year note that frightened them." In other words, you understood at that time that there were two classes of deferred payments; one was the assumption of the DuBois mortgage, which still had six and half years to run. Is that correct?

A. I think that is about it.

Q. That was a four and half per cent mortgage?

A. Yes.

Q. In the original transaction? A. Yes.

Q. And that was 4½% money that Mr. Bates during your absence presumed to go over and tell Mr. Kerry was a rate of 6%?

A. Mr. Bates will have to answer for himself.

Q. That is what you were informed?

A. That he had gone over, yes.

Q. Answer the question, Mr. Early. That was the 6% money that Mr. Bates spoke to him about—the DuBois notes?

(Testimony of Charles T. Early.)

A. Yes, what was going to Mr. DuBois was raised, the rate of interest, from 4½ to 6%.

Q. And that is the correction you made as quickly as you heard he had interfered in that particular, wasn't it? A. Yes.

Q. The three year notes were always in the transaction 6% notes, were they not?

(No answer.)

Q. Mr. Early, you said—this is not really upon your direct examination, but partly on that and partly on the other—you said that you had resigned from this company along sometime in August or September of 1921? A. August, I think.

Q. Your resignation was demanded, was it not, Mr. Early? A. No, sir.

Q. I will ask you if it isn't a fact, Mr. Early, that the latter part of August or the first of September, 1920, for the first time [214] it was discovered that you had knowledge of a transaction involving \$140,000 worth of steel rails that you knew had not been and were not available, had been purchased and paid for to a man named A. C. Callan here at Portland, Oregon, and when your board of directors and the representatives of the company found that you had knowledge of the fact that Mr. Callan had appropriated this \$140,000, that knowledge coming to you as early as December, 1920, you not disclosing to the officers of your company until the latter part of August, that your resignation was then demanded?

A. No, sir, that is not true.

(Testimony of Charles T. Early.)

Mr. WILBUR.—I object to that as incompetent, immaterial, irrelevant and not recross.

A. It is absolutely untrue anyhow.

COURT.—Goes to the credibility of the witness.

Mr. WILBUR.—He has answered that it is not true.

Q. Is it a fact, is it not, Mr. Early, that you did have full knowledge of a transaction with one A. C. Callan and the Oregon Lumber Company, by virtue of which they purchased some six hundred odd tons of steel rails, and that you had knowledge of the fact that the auditor of the Oregon-American Lumber Company had advanced approximately \$140,000, and that when the audit of that company was being made by Price-Waterhouse the fact that you knew that Callan didn't have the rails that had been paid for, and with that knowledge, as late as May, 1921, you caused or directed the auditor of the company to pay an additional \$30,000 to Mr. Callan, then knowing that he had already defaulted upon some \$140,000 worth of rails that had been purchased?

A. That is partially true but mostly untrue. The \$30,000 or \$15,000 was advanced, and there was obtained for that some thirty thousand odd dollars worth of rails, and it was advanced upon [215] the advice of well known attorneys like Huntington & Wilson and Judge McCamant, and that part of the deal, as far as I am concerned, I am proud of it. We put up \$15,000 and got \$34,000 for it. The facts in relation to that deal

(Testimony of Charles T. Early.)

are these: that there was a contract entered into for the purchase of steel rails by the company, supposing that Mr. Callan owned them. It developed later that he had only partially paid and the United States Government had title, and it is a fact that the auditor paid without getting a bill of sale, the last \$75,000 on these rails, which really caused the trouble. Now to go back to the beginning of the transaction, there was a certain amount paid with the understanding that there would be other moneys paid within a certain time. You had paid, according to my recollection, up to about \$50,000, and Mr. Callan was in position on more than one occasion to take that \$50,000 or the \$75,000, whatever it might have been, and you had no recourse whatever.

Q. The fact remains, Mr. Early, that in your conference with the Board of Directors of this company and its representatives, from the time that you came to Ogden in 1920, in October, until September of 1921, and you had been then reporting, as you said a while ago that it was your duty to report, to the Board of Directors and officers, throughout 1921, and you never made any disclosure of the fact that this \$140,000 had been advanced and lost?

A. It wasn't advanced and lost but report was made on it to the president of the company at Chicago.

Q. There was never any report made to myself, who was directing the affairs from October, 1920, or to the Board of Directors although you had

(Testimony of Charles T. Early.)

knowledge of that, until it was discovered here about the first of September, 1921? Isn't that true? A. No, I don't think so.

Q. You don't think so?

A. No, sir, because it was reported to Mr. Eccles. [216]

Q. But it wasn't reported to any other person or persons, was it by you?

A. It wasn't reported to the Board. I wasn't reporting to the Board. Never met them until late in 19—.

Q. You didn't report to me either, did you?

A. You were out here and knew all about it, were told all about it when you were here.

Q. That was in September, 1921?

A. I don't think so.

Q. And it was following that, was it not, Mr. Early, that your connection with this company, with the Oregon Lumber Company, with the Sumpter Valley Railroad Company, the Mount Hood Railroad Company, and all other companies in which the common money was spread out—that your resignation was taken as an officer of this company?

A. My resignation was taken, yes, but I defy anybody to show one word in writing, or to refer to any conversation where my resignation was ever asked for. It never was asked for.

Mr. DEVINE.—With the reservation I made at the last cross-examination, that is all.

Redirect Examination.

Q. These last letters that have been spoken

(Testimony of Charles T. Early.)

about here, this Callan matter, as I understand, is a matter where Mr. Callan, or some man from whom you purchased rails, didn't have the rails to deliver, is that the idea? I never heard of it before.

A. We had a contract with the government in the Spruce Corporation, I think, for several hundred tons of rails. We made advances on them, and finally Mr. Callan made deliveries. We did get a lot of rail. This payment Mr. Devine refers to, after we knew that he didn't have the rails, didn't own the rails, was made, as I say, on the advice of as good attorneys as this town has.

Q. Who were your attorneys?

A. Huntington & Wilson, and Judge McCamant. As far as making that [217] advance and getting that amount of rails, I think it was a good deal. Whenever you can put up \$15,000 and get \$34,000 it is a good thing to do.

Q. You acted on the advice of your attorneys, Judge McCamant and Huntington & Wilson, on that matter? A. Yes, sir.

Q. Relative to your being asked to resign, I will show you this letter and this copy of resolution presented to you, and ask you if this resolution and letter was received by you, and that resolution for your services after thirty-three years with this company? A. Yes, sir.

Mr. WILBUR.—In view of the criticism of Mr. Early, I will be very glad to have these papers go in evidence.

Mr. DEVINE.—I have no objection to their being introduced in evidence, if material here.

Marked Plaintiff's Exhibit 7 and read as follows:

Plaintiff's Exhibit 7.

I, Royal Eccles, Secretary of the Oregon Lumber Company, a corporation organized and existing under the laws of the State of Utah, with its resident place of business in the City of Ogden, County of Weber, State of Utah, do hereby certify that at a duly convened meeting of the Board of Directors of the said Oregon Lumber Company, held at the office of the company, 621 David Eccles Building, City of Ogden, County of Weber, State of Utah, on Tuesday, the 20th day of September, 1921, the following resolution was passed:

RESOLUTION.

WHEREAS the Board of Directors of this company has this day accepted the resignation of Mr. Charles T. Early as Vice-President and General Manager of this company; and

WHEREAS such resignation has been accepted with due consideration and keen regret upon the part of this Board; and [218]

WHEREAS it is meet and proper that at this time this Board should officially record its acknowledgment of the past services of Mr. Charles T. Early in behalf of the company, and should officially express its appreciation of his spirit of helpfulness to the future management of this com-

pany manifested in his tender of services to the company in the future;

Now, therefore, be it **RESOLVED** that the Board of Directors of the Oregon Lumber Company hereby officially records its acknowledgment of the long and faithful service rendered by Mr. Charles T. Early as Vice-President and General Manager of this company, and also in other capacities covering thirty-three years of continuous service to this company.

RESOLVED FURTHER that this Board is of the opinion that in behalf of the members thereof and also the stockholders of the company, it is fitting that at this time of severance of Mr. Chas. T. Early from his connection with the company this Board should express to him on behalf of the members thereof and of the stockholders of the corporation their sense of obligation for the meritorious work which has been done by him during the period of his connection with the company, and they do further express their well wishes for his success in his future fields of labor.

RESOLVED FURTHER that this board is deeply appreciative of the offer of Mr. Chas. T. Early to co-operate with the future officers of the company to render them such aid and information as he may possess in matters pertaining to the affairs of the company to the furtherance of a successful management of its affairs, and that this Board, in the same spirit in which the offer is made, will be glad to accept such services in solving the future problems of the company.

RESOLVED FURTHER that the secretary be authorized and directed to spread these resolutions upon the minutes of the [219] meeting of the Board of Directors, and to send a certified copy of same to Mr. Charles T. Early.

I hereby certify that the above Resolution is a true and correct copy of the Resolution as spread upon the minutes of a meeting of the Board of Directors held September 20th, 1921, and is still in full force and effect and has never been repealed or revoked.

IN WITNESS WHEREOF, I have hereunto set my hand with the seal of the corporation this 22d day of September, 1921.

ROYAL ECCLES,
Secretary.

Mr. DEVINE.—That is the Oregon Lumber Company, is it not?

Mr. WILBUR.—Yes, as it appears here. And as has been stated here, these are closely allied. You have been trying, however, to pass some aspersions on this man who has been working for these people for thirty-three years. I have a letter here from Mr. Royal Eccles I would like to read also:

Marked Plaintiff's Exhibit 8 and read as follows:

Plaintiff's Exhibit 8.

DAVID ECCLES COMPANY.

Ogden, Utah, September, 24, 1921.

Mr. Chas. T. Early,

Portland, Oregon.

Dear Charlie:

At this time of your resignation I desire to take occasion to express my regret and esteem to a continuous service of a full thirty-three years which you have had with the Oregon Lumber Company—a service which began in menial labor and which in the course of time was not only worthy, but attained many of [220] the most important executive responsibilities in the management of the company. Such a service record must be something more to you than a mere satisfaction—indeed it is to other which is nothing less than an admiration.

Indeed, if I may presume to acknowledge a tenure of service of twenty-five successful years which you had associated under the direction of my father, it is in itself a testimony of loyalty and ability. I can but appreciate that his death did not confine its personal loss to us alone, for, in the many ramifications which his passing has subsequently provoked, it has had its consequences on others as well as us. The extent only has varied—the analysis always the same.

Assuring you of my sincere well wishes for suc-

(Testimony of Charles T. Early.)

cess in your future fields of endeavor, whatever they may be, I remain,

Sincerely yours,

ROYAL ECCLES.

Q. One question which is not properly redirect, that I would like to ask. Mr. Early, during the period when you had this first general contract with Mr. Bates, up to the time the stock was finally sold to the Central Coal & Coke Company, of Kansas City, as to the work that Mr. Bates was doing, can you tell the jury in a general way how often you came in contact with Mr. Bates, and how continuous it was? I want to know how much work he was doing, or how little, and how often you were in touch with him in discussing these various matters that you have testified to.

A. That would be very hard to say. I was in Portland perhaps twenty-five to thirty-three and a third per cent of my time, and when I was in the city most every day or two we were discussing either in person or over the telephone, or exchanging letters, but just how often—it would be quite frequent—how often I couldn't say at this time. [221]

Mr. DEVINE.—That is all, subject to the same reservation I had a little while ago.

Witness excused.

Mr. AGEE.—I move the Court to strike out all the evidence of Mr. Early concerning any contract between him and between the Oregon-American Lumber Company and Mr. Bates, and the contract

of employment, upon the ground that there is a total lack of evidence to show any authority upon the part of Mr. Early to make any such contract as that alleged in the complaint or to make any arrangement or contract with Mr. Bates concerning the disposition of any property of the defendant in this case, or for the purchase of any property that he alleges that he negotiated for the purchase of, upon the theory that there is no presumption that a person who occupies the position of director and vice-president has any authority to involve a corporation in the expenditure of such large sums of money as this arrangement would involve this company in; that there is no authority even for a general manager or president to make a contract which would involve the company in such an extraordinary expenditure as appears in this case, the rule being, as I understand it, that a general manager, even as testified to here in the way that Mr. Early has alluded to himself as general manager—while as a matter of fact he was only vice-president and director—but even if he were general manager, and conceding him to be general manager that that reserves to him not the power of the board of directors but only such power as is necessary to carry out the administration of the properties of the corporation.

Arguments.

Whereupon proceedings were adjourned until ten o'clock to-morrow morning. [222]

Wednesday, April 3, 1923, 10 A. M.

COURT.—It seems to me, as the evidence now stands, if we are to take the record as it now stands, that there is no sufficient evidence to show that Mr. Early had authority to enter into this contract. It was made within a month of the organization of the corporation, and the only evidence of his authority is his own statement that he assumed that he was general manager and was in the employ of the company, but there is no evidence of any employment by the company, or that he ever received any compensation from the company, or that the company had held him out, up to the time this contract was entered into at least, as representing it in any way, and this particluar contract, made in August, 1917, is the one upon which this action is based, and it is the one upon which this plaintiff must either stand or fall in this litigation. Unless Early had authority, either expressed or implied at the time he entered into that contract, it is not binding on the company unless there is proof of subsequent acquiescence and ratification, and there is no evidence offered, up to this time at least, to show any acquiescence or ratification by the company.

A corporation acts through its board of directors originally. It may and of course does act later through duly authorized agents but an agent to represent a corporation and to bind it by his contracts must have authority to do so, either expressed authority or implied authority arising from

the manner in which he is held out by the corporation, or it must acquiesce in and ratify his act.

Mr. Early testified that he never at any time reported this contract with Mr. Bates to the board of directors, and it is quite clear that Mr. Eccles, as president of the concern, [223] had no authority to either enter into the contract or to ratify it, because his authority as president alone was confined to presiding over the deliberations of the board, and he had no authority to make a contract of the kind that is sued on in this suit, unless he was authorized by his board of directors to do so, and there is no such evidence up to this time in this case.

More than that, I have examined this complaint with great deal of care and with possibly one exception the services that are sought to be recovered in this case were either for contracts relating to the purchase or lease of property by this company, the sale of its stock or sale of its property, and even a general manager would have no authority to enter into a contract of that kind and bind his company, and if he had no authority to do it, he certainly had no authority to employ another to act for him.

So that as the record now stands the evidence is not sufficient, in my judgment, to show that Mr. Early had any authority to bind the company by the particular contract upon which this action is based.

These transactions that occurred later, the railroad transaction and some of these others, if they

were ratified, subsequently ratified by the company, might constitute a separate cause of action but that is not the one upon which this action is prosecuted, and so the Court is of the opinion that the motion made is well taken and that the evidence should be stricken out.

Mr. SENN.—We desire to make a record in this case, and I presume that is the only way we can proceed—to put on our evidence.

COURT.—You can make an offer of proof; no use taking up the time of the Court presenting it in detail. [224]

Mr. SENN.—So we will have the record complete to take to a higher court.

COURT.—If you wish to make a record you can do so.

Mr. SENN.—We can dictate to the reporter what we expect to show if the Court desires us to do it that way.

COURT.—In a general way, just a general statement, not in detail. I suppose your offer would be simply evidence tending to support the allegations of the complaint.

Mr. SENN.—Yes.

Mr. WILSON.—I suggest that the jury be excused while making the offer.

COURT.—I don't know that that will make any difference; it will probably never get to the jury.

Mr. SENN.—(Makes offer of proof.) That on behalf of the plaintiff the evidence will disclose that Mr. Bates performed all the services set forth in the complaint, and performed them in the manner

set forth in the complaint; that he reported such transactions and performances of the services set forth in the complaint to David C. Eccles at Ogden, Utah, and also at Portland, Oregon, and kept Mr. David C. Eccles fully informed as to all the services which he rendered for this corporation. That it will also show that Mr. David C. Eccles, during July and August of 1917, particularly in August, 1917, and later, instructed and requested Mr. Bates to perform these services, at least a large part of them, and that under the instructions of David Eccles, and also under the instructions of Charles T. Early he did perform these services, expended the money—advanced the money set forth in the complaint, and spent the time for which he is seeking to recover.

We wish to also show that on the Kerry deal he produced a purchaser ready, willing and able to purchase that [225] property; that he was guaranteed and it was agreed in writing that he should be paid all in excess of three dollars which the purchaser might agree to pay for that property, and that the deal was not consummated because of the act of the defendant corporation refusing to abide by the contract entered into with Mr. Porter, A. S. Kerry and the Kerry Timber Company.

We also expect to show and prove that the corporation, the Oregon-American Lumber Company, received the fruits and benefits of the services performed by Mr. Bates in that the proposition of the lease of the United Railway was accepted by it, a contract was entered into by it with the United

Railway Company for the rental of that property for a period of ninety-nine years at \$45,000 a year.

We shall also prove that in the Keith transaction, where he was instructed and requested both by Mr. Early and David C. Eccles, the president of the company, to interview people who might purchase this property, that he did secure the Central Coal & Coke Company as purchasers of this stock; that he was ordered and directed to find a purchaser for either the stock or the timber-land, they informing him that they could transfer their property either by stock transfer or by transfer of the property itself, and that in accordance with this contract Mr. Bates produced this purchaser, and this purchaser did purchase from the defendant company this stock.

COURT.—Purchaser from whom? The defendant or the owners of this stock?

Mr. SENN.—From the company because 316 shares of the stock were held by the president in trust as treasury stock; and also that the stockholders assigned and set over their stock to the Central Coal & Coke Company, and that the price paid by the Central Coal & Coke Company was seven million dollars for this [226] transfer, and that he was promised and agreed to be paid by the defendant the sum of two and a half per cent as a measure of compensation and for his services in this transaction. In other words, we will be able to show and we offer to show that the statements and allegations set forth in the complaint are true. We will also show that a demand

for these services has been made and that the payment thereof has been refused, and that the charges and expenses as alleged in the complaint are reasonable.

And on that evidence and that statement of proof, offer of proof, we contend we are entitled to go to this jury. And we also offer to prove that our evidence will support each and every one of the allegations and elements set forth in the complaint.

COURT.—The specific items?

Mr. SENN.—Yes.

Mr. AGEE.—To this offer we object upon the ground it is incompetent, no proper foundation laid for it, and the proof offered does not tend to establish the authority of Mr. Early to make the contract in question, as the greater portion of the offer goes to the proof of the contract and not to the question of authority to make it.

COURT.—Very well. What further procedure do you desire to take in this case? Your offer is overruled.

Mr. SENN.—Save an exception.

Mr. AGEE.—We move that the jury be instructed to return a verdict for the defendant.

Mr. SENN.—We take an exception to the ruling of the Court directing a verdict.

COURT.—Now, gentlemen, in the view of the Court [227] there is only one verdict this jury can render and that is one in favor of the defendant, and I will ask some one of you gentlemen to sign this verdict. It shows on its face it is done

by direction of the Court, so the Court is responsible for the verdict.

In the District Court of the United States for the
District of Oregon.

PAUL BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY,
Defendant.

I, Mary E. Bell, being first duly sworn, depose and say that I acted as official reporter in the above-entitled court and cause, that I faithfully and truly reported all the proceedings therein on the trial thereof, and that the foregoing is a full, true and correct transcript of the evidence and all the proceedings had in the trial of the above matter, and the whole thereof.

[Seal]

MARY E. BELL.

Subscribed and sworn to before me this 25th day of May, 1923.

F. S. SENN,

Notary Public for Oregon.

Comm. expires July 9, 1924. [228]

And now because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge of the above-entitled court, and the Judge trying the above-entitled action do hereby certify that the foregoing bill of exceptions truly states all the proceedings had before me on

the trial of the above action and contains all the evidence, both oral and written, introduced by each of said parties throughout said trial together with the rulings of the Court on the motions made, exceptions taken, and on the questions of law duly presented at said trial, and all the exhibits introduced by both parties, being Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 and Defendant's Exhibits "A," "B," "C," "D," "E" and "F"; and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules of this Court and is now signed and settled as and for the bill of exceptions in the above-entitled action and the same is ordered made a part of the record in said action.

R. S. BEAN,

Judge of the Above-entitled Court.

Dated this 23d day of June, 1923.

Due service of the above bill of exceptions was acknowledged this 23d day of June, 1923, and the same is satisfactory.

WM. A. MUNLY,

Of Attorneys for Defendants.

Filed June 23, 1923. G. H. Marsh, Clerk. [229]

AND AFTERWARDS, to wit, on the 13th day of July, 1923, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [230]

Praecipe for Transcript of Record.

- (1) Complaint.
- (2) Motion to file amended complaint.
- (3) Order on same.
- (4) Motion to separate amended complaint into paragraphs.
- (5) Order overruling motion.
- (6) Motion requiring plaintiff to elect whether he would rely upon *quantum meruit* or upon mixed contract.
- (6½) Order overruling motion to elect.
- (7) Demurrer of defendant to amended complaint.
- (8) Order overruling demurrer.
- (9) Decision on demurrer.
- (10) Answer to amended complaint.
- (11) Reply.
- (12) Motion to file second amended complaint.
- (12½) Second amended complaint.
- (14) Order on same.
- (15) Verdict of the jury.
- (16) Judgment on verdict.
- (17) Bill of exceptions.
- (18) Petition for writ of error.
- (19) Assignments of error.
- (20) Order allowing writ.
- (21) Bond.

(22) Order certifying original exhibits.

(23) Citation.

F. S. SENN.

WM. A. MUNLY.

Filed July 13, 1923. G. H. Marsh, Clerk. [231]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 3 to 231, inclusive, constitute the transcript of record on writ of error in the case in said court in which Paul C. Bates is plaintiff and plaintiff in error and the Oregon-American Lumber Company, a Utah corporation, is defendant and defendant in error; that the said transcript of record has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error, and is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the said transcript is \$65.05, and that the same has been paid by said plaintiff in error.

I return, with the said transcript of record attached thereto the original writ of error and the original citation filed in said cause.

In Testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 24th day of July, 1923.

[Seal]

G. H. MARSH,

Clerk. [232]

[Endorsed]: No. 4063. United States Circuit Court of Appeals for the Ninth Circuit. Paul C. Bates, Plaintiff in Error, vs. Oregon-American Lumber Company, a Utah Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed July 26, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States for the District of Oregon.

No. L—8889.

PAUL C. BATES,

Plaintiff,

vs.

OREGON-AMERICAN LUMBER COMPANY, a
Utah Corporation,

Defendant.

Order Extending Time to and Including August 1, 1923, to File Record and Docket Cause.

Based upon the stipulation herein, it is

ORDERED, ADJUDGED and DECREED that the plaintiff and the defendant are hereby granted to and including July 1, 1923, in which to make amendments to the proposed bill of exceptions herein, and that the defendant is hereby granted to and including July 1, 1923, in which to object to the proposed bill of exceptions or any amendment thereto, and the time for settling and agreeing to the proposed bill of exceptions is hereby extended to and including July 1, 1923.

It is further ORDERED and ADJUDGED that the time for docketing and filing the transcript on appeal in the Circuit Court of Appeals for the Ninth Circuit of the United States, is hereby enlarged and extended to and including August 1, 1923.

R. S. BEAN,
Judge.

Dated this 14th day of June, 1923.

[Endorsed]: No. 4063. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 1, 1923, to File Record and Docket Cause. Filed Jun. 25, 1923. F. D. Monckton, Clerk. Refiled Jul. 26, 1923. F. D. Monckton, Clerk.

